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ABSTRACT

This handbook presents a course developed to provide a national perspective for attorneys who represent state and local child support enforcement agencies operating under Title IV-D of the Social Security Act. The introduction provides an overview of the child support problem in the United States, citing causes and effects of the problem and explaining the current status of the Child Support Enforcement Program. Chapter 1 explores the federal role in the Child Support Enforcement Program and examines the functions of the federal Office of Child Support Enforcement. Chapter 2 focuses on state and local roles in the Child Support Enforcement Program. Chapter 3 looks at the role of the attorney in child support enforcement and addresses several specific ethical problems. Chapter 4 concerns the pretrial activities of interviewing witnesses, negotiation, and discovery. The establishment of support obligations is discussed in chapter 5 and enforcing those obligations is considered in chapter 6. Chapter 7 presents defenses to enforcement and chapter 8 looks at expedited processes. Chapter 9 addresses the problems associated with interstate cases. Chapter 10 is concerned with the establishment of paternity. Appendices contain information related to the legislative history of child support enforcement, scientific testing for a paternity establishment, and paternity probabilities: attack and rebuttal. (NB)

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Essentials for Attorneys in Child Support Enforcement

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Essentials for Attorneys in Child Support Enforcement

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PREFACE

Essentials for Attorneys in Child Support Enforcement is a course developed by the National Institute for Child Support Enforcement under contract to the Office of Child Support Enforcement. The course reflects a first step in developing an integrated training curriculum with a national perspective for attorneys who represent State and local child support enforcement agencies operating under Title IV-D of the Social Security Act.

Program attorneys generally are employed at the county level by prosecuting or district attorneys or by the courts. Some are employed by the State IV-D agency, directly or by way of contract. While the forms of the relationship may vary, many characteristics are common among the different groups. Most IV-D attorneys are recent law school graduates who receive the bulk of their training on the job, in both local procedure and the relevant substantive law. Individual caseloads are high, as is staff turnover. The majority of these attorneys have competing responsibilities in other law enforcement areas. This combination of characteristics creates a constant need for training. In addition, because legal research consumes precious time, there is a need for a compilation of case law relevant to child support establishment and enforcement.

This Handbook does not purport to be an exhaustive collection of the law. However, it does attempt to identify as many legal and practical issues as possible, within the constraints of available resources. Program attorneys should use this Handbook as a resource to understand the various concepts presented and as an initial research tool. Cases cited in the text or in footnotes should be shepardized prior to being presented to a court as authority. We hope that this Handbook will enable Program attorneys to enhance their performance both in and out of court.

INTRODUCTION
The Child Support Problem in America

In 1984, Congress enacted Public Law (P.L.) 98-378, better known as the Child Support Enforcement Amendments. This is by far the most significant step taken by the Federal Government in the area of child support enforcement since Congress enacted P.L. 93-647 in 1975 to establish Title IV-D of the Social Security Act, thereby creating the Child Support Enforcement Program. Both the 1975 implementing legislation and the 1984 Amendments were inspired by dramatic changes in our social structure--the growing instability of marital relationships, the feminization of poverty, and increases in out-of-wedlock births, especially among teenagers. As a result, more and more children are living in single-parent families. In single-parent households, financial contributions from absent parents often fail to constitute a significant portion of the family income. In fact, almost nine out of every ten children who are receiving welfare through Aid to Families with Dependent Children (AFDC) have a living parent absent from the home.[1]

This introduction discusses the child support problem in greater detail, identifies its effects on society at large and the legal system in particular, and assesses the effectiveness of the Child Support Enforcement Program as it completes the end of its first decade.

CAUSES OF THE CHILD SUPPORT PROBLEM

The child support enforcement caseload has grown in response to a host of complex demographic, economic, and sociological factors. The following pages discuss recent developments that have affected the child support problem in America and forced families to seek AFDC benefits. These developments are increased rates of divorce and desertion, households headed by single females, and out-of-wedlock births.

Divorce

In the last several decades, divorce rates have increased dramatically. Between 1963 and 1975, the national divorce rate increased 100 percent and increased 100 percent again in each year thereafter until 1981. In 1981, the number of annual divorces climbed to a record 1.21 million. It is further estimated that 49 percent of all existing marriages will end in divorce.[2]

Desertion

The dimensions of the nonsupport problem become even more staggering when one considers the vast numbers of couples who simply separate without obtaining a divorce. In 1960 the number of separated individuals heading a household in which children reside was approximately 1,058,000. By 1983, the number had increased to over 1,917,000, which represents 83 percent increase. Of this 1983 figure, approximately 1.8 million were headed by women.[3]

An important aspect of marital disruption is the impact on children. Studies have revealed that today there is a greater chance than ever before that a couple will have children at the time of the divorce or separation. In 1983, 21.8 percent of children under 18 lived with only one parent (19.4 percent with the mother; 2.4 percent with the father). This is a 107 percent increase from 1970.[4] The Census Bureau estimates that nearly half of the children born during 1982 will spend a "significant portion" of their lives in a single-parent family.[5]

Out-of-Wedlock Birth Rates

By far the most significant rate of increase in single-parent households has occurred among never-married mothers. Between 1970 and 1983, the number of never-married mothers increased by 377 percent. By 1983, one-fourth of all single parents were in this category. Of the 7.6 million women heading single-parent families in 1984, 2.1 million had never been married. Of particular concern is the rate of out-of-wedlock births among teenagers. In 1981, 537,024 children were born to teenage mothers, and about one-half of these babies were born out of wedlock.[6]

EFFECTS OF THE CHILD SUPPORT PROBLEM

These changes in the social structure of the United States, coupled with the lack of an accessible and effective process for ensuring that both parents contribute to the support of their offspring, have produced at least three significant effects. First, a greater proportion of women who have children are finding themselves living below the poverty line, a phenomenon that has been termed "the feminization of poverty." Second, welfare expenditures to support dependent children continue to rise during a period in which Federal, State, and local revenues are hard pressed to meet taxpayers' expectations for other necessary governmental services. Third, parents who fail to pay or receive child support lose respect for the legal system, which often has lacked the authority, will, and resources to provide effective remedies.

The Feminization of Poverty

A growing number of single mothers are heading their own households. In 1984, there were 33 million families with children under 18 in the home, and 7.7 million were one-parent households headed by women. This figure represents a 13.2 percent increase since 1980, and a 100 percent increase since 1970.[7] "As a consequence, increasing proportions of families are headed by women with sole responsibility for raising and caring for children. Since the probability that a woman will become a widow has not changed substantially, the increase in female-headed households can be attributed directly to the rising divorce and [out-of-wedlock] birth rates."[8]

This situation is economically as well as sociologically significant because the absence of a parent usually means a lower standard of living for the family. In 1983, the poverty rate for the Nation, determined on an income-per-family basis, was 15.2 percent. The rate was 40 percent for single-parent families headed by white women and 75 percent for those headed by black women.[9] The composite poverty rate for all families headed by females with no husband present was more than 3 times that for married-couple families.[10] In short, society is faced with an increasing number of dependent children in female-headed households with marginal incomes.

These women, left alone to care for the children, frequently cannot cope adequately on their own. It is difficult both to care for children and work. Those who do work usually cannot command a sufficient salary to meet the needs of their families. Without financial support from absent fathers, mothers very often are forced to seek public assistance. As of March 1984, median incomes for female heads of households were as follows: married, absent husband, $8,851; widowed, $8,806; divorced, $13,486; never married, $13,251.[11]

According to the 1981 survey on Child Support and Alimony conducted by the U.S. Department of Health and Human Services (DHHS) and the Department of Commerce, of the 8.4 million women living with a child under 21 years of age whose father was not living in the household, 59 percent were awarded child support. However, of the four million women due child support payments in 1981, only 47 percent received the full amount; 25 percent received partial payments; and 28 percent received nothing. Consequently, the problem of increasing welfare costs in the United States is, to a considerable extent, a problem of the nonsupport of children by their absent parents.

Increasing Welfare Expenditures

Until the 1930s, Government involvement in the support of dependent children was virtually nonexistent, except for the imposition of criminal remedies for nonsupport. However, because of the Depression, by 1933 many people were in need of public assistance. Approximately 2 1/2 years later, on August 14, 1935, Congress passed the Social Security Act, which was signed by President Franklin D. Roosevelt on the same day. The Act was the first attempt at providing social insurance in our country.

The original Act contained no comprehensive system of social insurance, and it was amended throughout the years to include many categories of need. In an early amendment, Title IV-A of the Act, Aid to Dependent Children [now Aid to Families with Dependent Children (AFDC)], the Federal Government assumed some responsibility for the support of needy dependent children. The AFDC program encourages the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation to needy dependent children and the parents or relatives with whom the children reside. The AFDC program was created to help maintain and strengthen family life. By providing financial assistance to custodial relatives in addition to the children, parental care and protection of the children can continue.

Government spending on all social welfare programs increased rapidly over the years, from $77 billion in 1965 to over $286 billion in 1975, almost a fourfold increase in a single decade. Eventually, taxpayers began to demand reduced Government spending, and Congress began to examine welfare programs for possible budget cuts or changes that could make the system more effective. The rest of this section discusses on the Congressional study of and response to the AFDC program because of its special relationship to the nonsupport problem.

The size of the child support problem in the United States was difficult to analyze until recently because there was little data on the subject.[12] However, it has become clear that the number of families receiving AFDC has a direct relationship to the problem of nonsupport.[13] Figures on the AFDC program show a steady increase in both AFDC recipients and associated costs. Since the beginning of the program, there has been a gradual upward trend in AFDC caseloads. The number of children receiving AFDC first doubled from June 1948 to February 1960 and then doubled again in less than 9 years--from February 1960 to January 1969. Twelve years later, in March 1981, the number of children receiving AFDC had increased another 77 percent to 7.7 million.[14]

Even more significant is the increase in the proportion of children under age 18 receiving AFDC. In 1948, 25 children per 1,000 under age 18 in the United States received AFDC. By December 1966, 18 years later, the number of these AFDC children had doubled in relation to the total number of children. It then doubled again in less than 4 years, from December 1966 to June 1971. By 1973, there were 113 AFDC children per 1,000 under age 18 in the United States. In other words, 11.3 percent of the children under age 18 in the United States were receiving AFDC in 1973. This is compared to only 2.5 percent in 1948.

The costs associated with these increases have continued to be enormous. For example, between calendar years 1960 and 1983, the cost of AFDC money payments increased from $1.0 billion to $13.8 billion.[15] Investigation of this dramatic increase in the AFDC rolls shows a drastic change in the nature of the AFDC recipients nationwide since the program began in 1935. Initially, death of the father was the main basis for eligibility. Since World War II, the reason increasingly has become the absence of the father from the home. This figure has risen from 45 percent of the AFDC cases in 1948 to 88 percent in 1983.[16]

An Overburdened Legal System

When Congress created the Child Support Enforcement Program in 1975, it delegated to each State legislature the authority to decide on the structure of the program within each State, the resources committed to the task, and the legal procedures and remedies available to the program. State legislatures responded by enacting implementing legislation that authorized the creation of new agencies at the State or local level to locate absent parents and prepare cases for stipulation or litigation. Legislators apparently assumed that existing court procedures and resources would be sufficient to handle the volume of cases to be processed. Often, this assumption proved incorrect. Backlogs have occurred, both in program attorneys' offices and in the courts. Many courts have lacked sufficient personnel to handle the scheduling, hearing, and processing of cases. Competition from juvenile court and child abuse caseloads has made court time a precious commodity. Remedies have been inadequate to enforce compliance with existing support orders or too cumbersome to allow for expeditious and efficient case processing.

In addition to exacerbating the nonsupport problem, these insufficiencies have caused a significant proportion of the populace to lose confidence in and even respect for the legal system. As divorce and out-of-wedlock birth rates have risen, many individuals who have never been exposed to the legal system have become involved in divorce proceedings and paternity suits. These parents' sole experience with the legal system has been to witness its difficulty in resolving these disputes and its inability to enforce a resolution once entered. Such experiences take a toll in public confidence and respect.

THE CHILD SUPPORT ENFORCEMENT PROGRAM

The negative effects of the child support problem discussed above have helped to promote the enactment of strong legislation at the Federal level. In particular, Congress created the Child Support Enforcement Program. The Program, Title IV-D of the Social Security Act (Part B of P.L. 93-647), was signed into law in 1975. As noted in Appendix A, Legislative History, at the end of this Handbook, Congress has acted in almost every legislative session since that year to improve or expand the Program. The Program is charged with locating absent parents, establishing paternity, and obtaining and enforcing support owed by absent parents to their children. The Federal legislation places responsibility for the Child Support Enforcement Program at both the Federal and State levels, giving the DHHS, Office of Child Support Enforcement (OCSE) primary administrative, regulatory, and technical assistance responsibilities and delegating to State IV-D agencies the operational aspects of the Program. With the Child Support Enforcement Amendments of 1984, Congress set forth more specific requirements as to how these State and local operations are to be carried out. Most of these requirements, which are discussed in detail in subsequent chapters, are based on successful practices in effect in one or more States.

Even though the Child Support Enforcement Program centers on the enforcement and collection of child support, Program attorneys should be aware of the benefits of the Program to the taxpayer, the child, and the legal system. These benefits are discussed below.

- The taxpayer. The millions of dollars that the Child Support Enforcement Program collects each year represent a direct benefit to taxpayers as well as children and families. In fact, the Program is one of few government programs that helps needy families while also saving tax dollars. As of October 1, 1985, the Federal Government matches 70 percent of costs incurred by States in the administration of the Program (the rates will be reduced to 68 percent on October 1, 1987, and again to 66 percent on October 1, 1989 [48 USC 655]); matches 90 percent for costs related to the development of management information systems; and permits the States to retain as much as 50 percent of support monies collected to offset the State costs of AFDC.[17] As an added incentive to operate effective programs, States and localities involved in the collection and enforcement of child support are entitled to an amount ranging from 6 to 10 percent of both AFDC and non-AFDC collections. These "incentive payments" may be used for whatever purposes governing officials deem appropriate.[18]

  In addition to its direct revenue-generating aspects, the Child Support Enforcement Program produces indirect financial benefits through the provision of services to non-AFDC families who, without income from child support, might be forced to turn to public assistance. Similarly, through Program efforts, sufficient support is collected on behalf of some AFDC families to eliminate their dependence on welfare and related assistance programs.

- The child. Although its primary role is a financial one, the Child Support Enforcement Program clearly offers social, economic, and medical benefits to children and fosters in families a sense of parental responsibility, heritage, and self-esteem. Establishing paternity for a child born out of wedlock and having that parent contribute financial assistance for the child's upbringing (that otherwise might come from public funds) benefit society and the child. In addition to providing an alternative source of income for the family, absent parents may be able to provide their children with access to such "social entitlements" as Social Security benefits, pension benefits, veterans' benefits, and other rights of inheritance.

The children also gain social and psychological advantages from having legally identified parents and a sense of family heritage. A legally established relationship is a first step in creating a psychological and social bond between a father and his child. Perhaps the most important of these advantages is escaping the prejudices often held against children who cannot identify their fathers.

Further, it is in the child's best medical interest to know who his or her parents are. A significant number of diseases, illnesses, birth defects, and other abnormalities are passed to children by their parents. This knowledge of medical history is the only way of predicting a child's susceptibility to some medical disorder before it occurs.

- The legal system. As the focal point of the Child Support Enforcement Program and the upholder of strong public policy interests in protecting the rights of children and their parents, the legal system can derive certain benefits by becoming familiar with and more involved in State and local child support enforcement programs. First, rapid enforcement of support orders conditions the absent parent to avoid the inconvenience of a court appearance by making regular child support payments. Second, improved handling of child support cases will increase respect for judicial decrees and orders and increase community support for the program. Third, Federal financial participation is available for certain judicial staff and operational costs through the State IV-D agency, when properly documented. Finally, the legal system has the fundamental responsibility to ensure that the rights of all parties (the State, the child, the parents, and the taxpayers) are protected. The system can carry out this task more easily and effectively when the judiciary is well informed about all legal aspects and administrative ramifications of the Child Support Enforcement Program.

CURRENT STATUS OF THE CHILD SUPPORT ENFORCEMENT PROGRAM

The Child Support Enforcement Program can point to significant achievements. These include the development of a Federal organizational and operational capability through OCSE to support State IV-D programs; the building of a comprehensive policy and regulatory base; and the provision of high quality services and products to States and jurisdictions operating the IV-D Program.

Clearly, the best measure of the Child Support Enforcement Program's nationwide effectiveness during its brief history is the steady growth in collections: present AFDC collections more than quadruple the amount collected in 1975. From Federal fiscal year (FY) 76 through FY 84, more than $13.2 billion in child support payments have been collected, $5.7 billion of that amount on behalf of families receiving AFDC. The total amounts collected each year have increased steadily from $500 million in FY 76 to $2.4 billion in FY 84. In the same period of time, the paternity of over 1.2 million children was established; legally enforceable support orders were established in about 3.3 million cases. In addition, from FY 80 to FY 84, nearly 4 million absent parents were located.

These achievements have been realized while actually saving or making money for State and local governments. For example, in FY 84, for every dollar spent on IV-D operating expenses, $1.38 was collected on behalf of AFDC families and used to reimburse State and local governments, and $1.66 was collected per dollar on behalf of non-AFDC families. This cost-effective operation, combined with incentive payments from the Federal Government, provided over $350 million in revenue to State and local treasuries during the year.[19]

Notwithstanding these favorable trends in collection growth, and despite its achievements, OCSE is concerned with the rate of progress of State and local IV-D agencies in operating more cost-effective programs. Collections made on behalf of children have increased at a slower rate in recent years. At the same time, Program expenditures are increasing steadily. If this trend continues, the overall Program eventually will cease to be cost-effective.

Of particular significance is the wide diversity of performance among States and localities. The ability of some States to operate highly effective programs shows that there is great potential for all States to generate additional revenue. Exhibit A provides a State-by-State review of both AFDC and non-AFDC cost-effectiveness ratios for FY 84.

Examining these discrepancies in performance shows that the potential for recovering additional revenue is staggering. If all of the States currently performing below the national average increased their cost-effectiveness to the national average, the additional welfare savings for the taxpayer would be almost $300 million per year. If the Program as a whole could recoup 25 percent of the AFDC costs, it would be collecting more than four times what it now collects.

Current collection and administrative expenditure growth trends suggest that program performance can be improved while administrative costs are contained. The U.S. Bureau of the Census estimates that over $3 billion in unpaid child support obligations exist nationwide.[20] Without affirmative judicial involvement and the effective operation of the Child Support Enforcement Program at the Federal, State, and local levels, the rights of children to receive support from both parents and to enjoy the benefits of having their paternity established are thwarted.

FOOTNOTES

/1/ U.S Social Security Administration, 1979 AFDC Recipient Characteristics Study, Publ. 13-11729 (Washington, DC: Govt. Print. Off., June 1982), Table 18.

/2/ Lenore White, The Divorce Revolution (New York, NY: Free Press, 1985).

/3/ March 1984 U.S. Census (Washington, DC: U.S. Bureau of the Census, August 1984).

/4/ U.S. Bureau of the Census, "Population Characteristics Series P-20, No. 372," Marital Status and Living Arrangements: March 1981 (Washington, DC: U.S. Bureau of the Census, June 1982), Table D.

/5/ Quote from Arthur Norton, Assistant Chief of the U.S. Bureau of Census Population Division, Washington Post, June 18, 1982.

/6/ U.S. Bureau of the Census, "Population Characteristics," op. cit.

/7/ Paul C. Glick, "American Household Structure in Transition," Family Planning Perspectives 16(5):2, September/October 1984.

/8/ Heather L. Ross and Isabel V. Sawhill, Time of Transition: The Growth of Families Headed by Women (Washington, DC: The Urban Institute, 1975), p. 21-24.

/9/ U.S. Congressional Research Service/Congressional Budget Office, Children in Poverty (Washington, DC: U.S. Govt. Print. Off., May 1985).

/10/ Asland Thorton and Deborah Freedman, "The Changing American Family," Population Bulletin 38(4) (Washington, DC: Population References Bureau, Inc., 1983).

/11/ U.S. Commission on Civil Rights, A Growing Crisis: Disadvantaged Women and Their Children, Clearinghouse Publ. 78 (Washington, DC: U.S. Govt. Print. Off., May 1983).

/12/ U.S. Senate Committee on Finance, "Child Support Data and Materials," 94th Congress of the U.S. Senate Committee on Finance, 1st Session (Washington, DC: U.S. Govt. Print. Off., 1975).

/13/ Id., p. 3.

/14/ U.S. Social Security Administration, Social Security Bulletin 45(8): Table M-30, August 1982.

/15/ American Children in Poverty (Washington, DC: Children's Defense Fund, 1984).

/16/ U.S. Bureau of the Census, Child Support and Alimony: Current Population Reports, Report 112 (Washington, DC: U.S. Bureau of the Census), p. 23.

/17/ These percentages could be affected by the Gramm-Rudman-Hollings legislation.

/18/ Note that the amount of this incentive payment may not exceed twice the amount awarded to the State on account of collections for AFDC cases. [42 USC 658.]

/19/ U.S. Department of Health and Human Services, Office of Child Support Enforcement, Child Support Enforcement; 9th Annual Report to the Congress for the Period Ending September 30, 1984 (Washington, DC: U.S. Govt. Print. Off., 1985).

/20/ U.S. Bureau of the Census, March 1984 U.S. Census, op. cit.

EXHIBIT A: STATE PROGRAM COLLECTIONS FOR FISCAL YEAR 1984*

	AFDC Collections	Non-AFDC Collections	Total Collections
National Average	**$1.38**	**$1.91**	**$3.29**
Alabama	0.82	0.30	1.11
Alaska	0.40	1.99	2.39
Arizona	0.33	1.84	2.18
Arkansas	1.08	0.55	1.63
California	1.23	1.08	2.31
Colorado	1.02	0.70	1.72
Connecticut	1.71	1.65	3.36
Delaware	1.66	2.97	4.64
District of Columbia	0.50	0.39	0.90
Florida	1.74	0.69	2.43
Georgia	1.44	0.37	1.80
Guam	0.93	0.59	1.52
Hawaii	1.03	1.33	2.37
Idaho	1.53	0.34	1.86
Illinois	1.31	0.99	2.31
Indiana	2.84	0.44	3.29
Iowa	3.87	1.82	5.69
Kansas	1.73	0.59	2.32
Kentucky	0.78	1.96	2.75
Louisiana	0.74	1.22	1.96
Maine	3.01	0.73	3.75
Maryland	1.31	2.84	4.15
Massachusetts	1.81	1.74	3.55
Michigan	2.40	4.46	6.86
Minnesota	1.61	1.33	2.94
Mississippi	1.64	0.13	1.77
Missouri	1.52	1.11	2.64
Montana	1.78	0.49	2.27
Nebraska	1.08	4.68	5.76
Nevada	0.52	1.39	1.91
New Hampshire	1.07	4.09	5.16
New Jersey	1.25	3.30	4.55
New Mexico	1.10	0.62	1.71
New York	0.77	1.27	2.03
North Carolina	1.49	1.17	2.65
North Dakota	1.61	0.70	2.31
Ohio	1.88	0.08	1.95
Oklahoma	1.01	0.35	1.36
Oregon	0.98	2.03	3.01

*Ratio of Collections to Total Administrative Costs

	AFDC Collections	Non-AFDC Collections	Total Collections
National Average	**$1.38**	**$1.91**	**$3.29**
Pennsylvania	1.48	6.89	8.37
Puerto Rico	0.35	24.26	24.61
Rhode Island	2.11	1.25	3.36
South Carolina	1.97	0.52	2.49
South Dakota	1.80	0.53	2.33
Tennessee	0.92	2.25	3.17
Texas	0.94	0.83	1.77
Utah	1.59	0.42	2.01
Vermont	2.26	0.18	2.44
Virgin Islands	0.37	3.11	3.48
Virginia	1.50	0.24	1.74
Washington	1.54	0.89	2.43
West Virginia	1.48	0.04	1.52
Wisconsin	2.21	1.04	3.25
Wyoming	1.76	0.82	2.58

Data from Child Support Enforcement: 9th Annual Report to the Congress for the Period Ending September 30, 1984 (Washington, DC: U.S. Govt. Print. Off., 1985).

CHAPTER 1

The Federal Role in the Child Support Enforcement Program

INTRODUCTION

Since the early 1950s, Congress has shown a persistent and increasingly forceful initiative to promote a viable Child Support Enforcement Program. Efforts to pass effective child support legislation began to intensify in the mid- to late 1960s, culminating in the 1975 passage of Title IV-D, the current comprehensive Child Support Enforcement Program. Prior to this time, Public Law (P.L.) 89-97, which passed in 1965, legally sanctioned the use of Social Security records to locate parents--a process that many States had employed informally for years. Upon enactment of this legislation, States could gain access to Social Security records through the Social Security Administration to obtain recent addresses and places of employment of absent parents. Next followed the 1967 passage of P.L. 90-248, providing States access to Internal Revenue Service (IRS) records to obtain addresses of absent parents. This law, which amended Title IV of the Social Security Act, included provisions that required State welfare agencies to establish a single unit whose mission was to collect child support and to establish paternity for children on public assistance. States also were required to work cooperatively with each other under child support reciprocity agreements and with courts and law enforcement officials.

Nevertheless, by 1972, it was clear from the rapid increase in numbers of AFDC recipients that the 1967 amendments had not produced the intended results. In light of their relative ineffectiveness, the U.S. Senate Finance Committee, under the chairmanship of Russell Long, had begun working in early 1971 to compile data on AFDC costs and child support enforcement. The Committee intended to use this information in developing new Social Security amendments to strengthen child support enforcement.

A group of Senators, most notably Long, Mondale, and Nunn, continued to push for a comprehensive Child Support Enforcement Program, in spite of unsuccessful attempts in 1972 and 1973. The Senators apparently envisioned legislation that would define clearly the functions and operational parameters for the State agencies that had been mandated by law in 1967 to collect child support and establish paternity. Other desired outcomes were to strengthen the Federal regulatory and oversight role, to establish parent locator services at the Federal and State levels, and to establish funding standards and procedures.

Despite repeated failures to get bills through both houses, the child support provisions that had been deleted from legislation a year earlier were incorporated into H.R. 17045 in late 1974. The provisions passed both the Senate and the House on December 20, 1974. President Ford signed the bill into law on January 4, 1975, as P.L. 93-647, the Social Security Amendments of 1974. Part B of P.L. 93-647 enacted Title IV-D of the Social Security Act, which created the Program for Child Support Enforcement and Establishment of Paternity.

Since 1975, Congress has examined a number of legislative initiatives and, almost every year, passed bills that address such things as funding to States, additional child support collection remedies, and mandated State recordkeeping and enforcement activities. Appendix A provides a chronological legislative history of Congress' activities, including a thorough discussion of the Child Support Enforcement Amendments of 1984, which embody the most comprehensive requirements on State child support enforcement practices since the Program was established.

THE FEDERAL OFFICE OF CHILD SUPPORT ENFORCEMENT

P.L. 93-647 required the Secretary of Health, Education, and Welfare [now the U.S. Department of Health and Human Services (DHHS)] to establish a separate organizational unit to oversee the operations of State child support enforcement programs. This was accomplished through the establishment, within DHHS, of the Office of Child Support Enforcement (OCSE). In a move reflecting the commitment of DHHS to the Child Support Enforcement Program, the director of OCSE began reporting directly to the Secretary of DHHS in early 1985. Previously the Commissioner of the Social Security Administration also served as the Director of OCSE.

OCSE's mission is to provide leadership in the planning, development, management, and coordination of the Department's Child Support Enforcement Program and activities authorized and directed by Title IV-D of the Social Security Act and other pertinent legislation. The general purpose of these programs and activities is to require States to enforce support obligations owed to children by locating absent parents, establishing paternity when necessary, and obtaining child support.

The specific responsibilities of OCSE are to:

- Establish regulations and standards for State programs for locating absent parents, establishing paternity, and obtaining child support
- Establish minimum organizational and staffing requirements for State units engaged in carrying out child support enforcement programs
- Review and approve State plans for child support enforcement programs
- Evaluate the implementation of State child support enforcement programs, conduct audits of State programs to assure their conformity with requirements; and, not less often than every three years, conduct a complete audit of these programs in each State and determine for the purposes of the penalty provision of section 403(h) of the Social Security Act [42 USC 603(h)(2)] whether the actual operation of such programs in each State conforms to Federal requirements
- Assist States in establishing adequate reporting procedures and maintaining records of the operations of child support enforcement programs
- Maintain records of all amounts collected and disbursed under child support enforcement programs and of the costs incurred in collecting such amounts

- Provide technical assistance to the States to help them establish effective systems for collecting child support and establishing paternity
- Certify applications from States for permission to use the courts of the United States to enforce court orders for support against absent parents (In interstate cases where a State has been noncompliant
- Operate the Federal Parent Locator Service (FPLS)
- Certify amounts of past-due child support obligations to the Secretary of the Treasury for collection
- Submit an annual report to the Congress on all activities undertaken relative to the Child Support Enforcement Program
- Establish regulations and standards for Federal financial participation in support of State child support enforcement programs.

The Organization of OCSE

OCSE is responsible for all program and policy aspects of Federal, State, and local child support enforcement programs. To carry out this mission, OCSE has been organized into the Office of the Director and five divisions: Management and Budget, Program Operations, Policy and Planning, Audit, and Information and Management Systems. The responsibilities of these divisions are discussed briefly below.

- The Division of Management and Budget directs the overall OCSE administrative management support effort in the areas of budget, personnel management, manpower and organizational management, travel management, space management, and procurement. This division also administers the OCSE State grants program.
- The Program Operations Division assesses State program performance and effectiveness by assisting OCSE Regional Offices in the conduct of special studies and reviews; provides technical assistance to Regional Offices and States on operational aspects of their programs; develops guides, concepts, and procedures for use in program operations; provides management consulting services to State child support enforcement agencies. In addition, this division develops and issues various publications related to child support, including a monthly newsletter, and operates the National Child Support Enforcement Reference Center. The National Child Support Enforcement Reference Center provides technical information concerning program management, research findings, and other topics related to child support enforcement.
- The Policy and Planning Division develops and analyzes policies, regulations, and legislation relevant to the Child Support Enforcement Program; develops procedures for State plan review and approval by Regional Offices; reviews Regional Office recommendations of State plan disapprovals; develops long-range plans and objectives for the agency; conducts statistical analyses and research projects; develops, coordinates, and conducts evaluation studies; and designs statistical reporting requirements and methods for obtaining data.

- The Audit Division conducts program results audits of State child support enforcement programs at least once every 3 years to determine program effectiveness and compliance with the Social Security Act; makes recommendations to the Director regarding imposition of the penalty provision of section 403(h) of the Social Security Act (see discussion below); develops and conducts administrative cost and other special audits; and develops guidance concerning audit procedures and standards.

- The Information and Management Systems Division develops and assists in the planning and installation of automated systems for use by State programs; provides consulting services and technical assistance to States on Advance Planning Documents for 90 percent Federal Financial Participation; reviews, evaluates, and approves requests for Federal matching funds for automated State/local child support enforcement systems; conducts periodic reviews of State Advance Planning Document installations; establishes and maintains automated system standards for the States; operates the Federal Parent Locator Service; provides computer services, automated systems design, development, and maintenance services to OCSE; operates the Federal Tax Offset System and the Project 1099 System; coordinates and monitors the IRS Full Collection Process; and, in conjunction with other OCSE users, operates the OCSE Management Information System.

- The OCSE Regional Offices provide technical assistance to States in establishing effective child support enforcement programs; provide interpretation of Child Support Enforcement Program regulations to State agencies; provide assistance to State agencies in developing State plans; review and approve or recommend disapproval of State plans and State plan amendments; evaluate the implementation of State programs; and review State activities to determine legitimacy of claims for Federal financial participation.

OCSE Projects and Activities

The provision of technical assistance to States is a mandated requirement of OCSE. To this end, OCSE operates the FPLS, produces Program-related publications, administers research and demonstration projects, provides training and disseminates information to the public, and conducts audits of State and local child support enforcement programs. Each of these activities is discussed below.

The Federal Parent Locator Service. OCSE operates the FPLS by communicating with other Federal agencies to find the current addresses and places of employment of absent parents. On receiving a request, the FPLS checks any records maintained by the Social Security Administration and the records of several other agencies including:

- Internal Revenue Service
- Department of Defense
- Department of Transporation (Coast Guard)
- Veterans' Administration
- National Personnel Records Center
- Selective Service System.

Publications. OCSE disseminates news and information regarding effective program techniques and management practices through its monthly publication Child Support Report and its periodic Abstracts of Child Support Techniques. In addition, OCSE publishes the semiannual Information Sharing Index, a listing of all child support enforcement materials, including research reports, available from the National Child Support Enforcement Reference Center. OCSE conveys its policies and procedures, including proposed and final Federal regulations, in Action Transmittals. Items of interest to State and local IV-D agencies are conveyed through Information Memoranda. These last two publications are issued as necessary. OCSE releases program data in tabular form, on a periodic basis, in a publication entitled Child Support Enforcement Statistics, and informs Congress of Federal and State child support enforcement activities through the Annual Report to Congress. All these materials are available at no cost, upon request, from the National Child Support Enforcement Reference Center, 6110 Executive Boulevard, Room 820, Rockville, MD 20852.

Research and demonstration projects. About $450,000 annually is available under Section 1110 of the Social Security Act to enable OCSE to employ contracts and grants for research and demonstration projects to add to existing knowledge and develop new methods and techniques. In addition, the Child Support Enforcement Amendments of 1984 authorize OCSE to award grants to encourage and promote improved interstate establishment and enforcement. These grants may be awarded to States beginning in Federal fiscal year (FY) 85; amounts authorized are $7 million in Federal fiscal year (FY) 85, $12 million in FY 86, and $15 million in subsequent years.

In FY 83, OCSE funded research and demonstration projects with the following purposes: to quantify the national collections potential; to develop models for assessing and updating child support award levels; to develop standards for parentage testing laboratories; to study the effects of child custody arrangements on child support payments by absent parents; to develop alternative methods for obtaining financial and case characteristic data about absent parents; to research the costs and benefits of paternity establishment; to improve interstate child support collections; to investigate the practical aspects of modern paternity testing; and to study court systems to improve the collection of court-ordered support. In addition, OCSE funded various demonstrations of administrative improvements in child support enforcement case processing techniques.

Training and public information. In order to provide more efficient and effective services to States and to improve management effectiveness, OCSE has contracted with several organizations to train child support enforcement professionals in proven methods of operation and to interpret the Program to interested outside parties and the general public. Included in this effort are the National Council of Juvenile and Family Court Judges, the National Institute for Child Support Enforcement, the National Conference of State Legislatures, the American Bar Association, and the National Governors' Association. The services of these five organizations are discussed below:

- National Council of Juvenile and Family Court Judges. Founded in 1937, the National Council of Juvenile and Family Court Judges (NCJFCJ) is the oldest judicial membership organization in the nation. Council membership comprises judges, referees, commissioners, and masters. Court administrators, clerks, attorneys, and others active in juvenile and family law may join as associate members. Membership services include continuing judicial education at the University of Nevada and other sites around the country; consultation and technical assistance; and a variety of publications, including the Juvenile and Family Law Digest and the Juvenile and Family Court Journal. The Council also provides research consultation services through its Research Division, the National Center for Juvenile Justice, in Pittsburgh, PA.

The training division of the NCJFCJ, the National College of Juvenile and Family Law (NCJFL) conducts over 100 continuing judicial education programs annually for professionals in the juvenile and family court field in cities throughout the United States and on the Reno campus of the University of Nevada. In 1985, over 12,000 people were trained. The faculty is composed of judges as well as internationally and nationally known experts in the fields of juvenile and family law, child development, sociology, psychology, medicine, and administration.

Since 1979, NCJFCJ has been providing child support enforcement judicial education under contract to OCSE. This includes presentations targeted to judicial participants at national, State, and local conferences; the incorporation of child support enforcement issues in courses offered at NCJFL in Reno; published articles on child support enforcement in periodicals targeted to the judicial community; and a 12-member judicial advisory committee that makes recommendations on child support enforcement issues.

- National Institute for Child Support Enforcement. The National Institute for Child Support Enforcement (NICSE) was established in March 1979 to develop and present courses tailored to the needs of Federal, State, and local personnel participating in the Child Support Enforcement Program and to assist with technology transfer among the States. In its 6 years, NICSE has developed 10 formal training courses and conducted over 500 deliveries to more than 10,000 child support enforcement professionals. NICSE has developed 16 publications and distributed over 80,000 of them to the field. This publication record makes the Institute a major source of printed information on the Child Support Enforcement Program. The Institute's working relationship with OCSE and to State and local programs also has facilitated the dissemination of information. Through its Lecture Presentation Series, NICSE staff and affiliated consultants have made over 175 presentations to audiences as large as 800 persons.

  Now beginning its 7th year of operations, NICSE continues to offer training courses, materials development, and lectures for the Child Support Enforcement Program. In addition, a new technical assistance project will apply Institute expertise in training development and delivery to help improve State training capabilities. The Institute also will be offering seminars for new State IV-D administrators and developing videotapes in support of various OCSE information campaigns.

- National Conference of State Legislatures. The National Conference of State Legislatures (NCSL) assists State legislatures in developing and enacting legislation beneficial to their child support enforcement programs. Toward this end, NCSL conducts research, provides information, and coordinates expert testimony concerning the experiences of States that have enacted similar laws.

- American Bar Association. The American Bar Association (ABA) has contracted with OCSE to operate a child support project as a component of its National Legal Resource Center for Child Advocacy and Protection. Under this contract, ABA provides training to attorneys, both inside and outside of the IV-D Program; produces related written materials; provides training to court and paralegal personnel on interstate support enforcement; and provides technical assistance to bar groups, legislative committees, State Child Support Commissions, and individual attorneys. In addition, ABA has worked with NCSL to develop model legislation such as the Model Interstate Income Withholding Act.

- National Governors' Association. The National Governors' Association (NGA) provides a mechanism for identifying and resolving problems related to the development and implementation of national policy and a forum for addressing State problems. The Association works with Congress on Federal and State policy issues, which include the Child Support Enforcement Program. This relationship enhances the sharing of Program knowledge among the States. Specifically, NGA has contracted with the Office of Child Support Enforcement to provide a forum for identifying issues that need to be brought to the attention of top-level policy makers at the State level for necessary action needed to implement Federal law in State child support enforcement agencies. NGA also develops and disseminates a variety of material on child support enforcement to key-level managers and policy makers in the States.

In addition to these contracted services, training and public awareness activities are conducted by OCSE Central and Regional Office staff.

Audits of State and Local Programs

OCSE audits of State programs significantly improve the Child Support Enforcement Program by alerting management to deficiencies and by recommending more effective and efficient methods of operation. Prior to the FY 86 audit period, OCSE auditors will complete State plan program results audits and system reviews of all 54 States and territories. Beginning in FY 86, the auditors will begin using criteria that are related to program performance indicators as well. To assess States' performance on a results-achieved, quantifiable basis, several initial performance indicators have been developed by OCSE in conjunction with State officials. These indicators are:

- $\frac{\text{AFDC IV-D Collections}}{\text{Total IV-D Expenditures}}$

- $\frac{\text{Non-AFDC Collections}}{\text{Total IV-D Expenditures}}$

- $\frac{\text{AFDC IV-D Collections}}{\text{IV-A Assistance Payments (minus payments to unemployed parents)}}$

Beginning with the audits for FY 86, these indicators will be used to evaluate performance and, with the program results audits of State Plan requirements, will constitute the bases for determining States' program effectiveness for purposes of the audit penalty. Beginning with FY 88 four additional performance indicators will be added to evaluate performance.

Three regulations implement the new audit system: 45 CFR 305.98 defines the performance indicators; 45 CFR 305.99 provides for notice to a State of a finding by the Secretary of DHHS that the State's program is not substantially in compliance with Program requirements and also provides for a corrective action period; and 45 CFR 305.100 establishes the sanctions to be applied against States found to be out of compliance and that fail to correct the deficiencies, based on the criteria contained in the Secretary's notice. The sanctions are applied by reducing the States' Federal IV-A matching funds, as follows:

- Not less than 1 nor more than 2 percent of such payments for a period beginning in accordance with the regulation not to exceed the 1-year period following the end of the suspension period
- Not less than 2 nor more than 3 percent of such payments if the finding is the second consecutive finding made as a result of an audit for a period beginning as of the second 1-year period following the suspension period not to exceed 1 year
- Not less than 3 nor more than 5 percent of such payments if the finding is the third or subsequent consecutive finding as a result of an audit for a period beginning as of the third 1-year period following the suspension period.

When a State corrects the deficiencies within the corrective action period, the penalty will not be imposed.

CHAPTER 2

State and Local Roles in the Child Support Enforcement Program

INTRODUCTION

Child support enforcement on the State and local levels specifically includes all activities devoted to securing the payment of established financial obligations from absent parents. To achieve this end, child support enforcement programs carry out many important federally mandated functions at the State and local levels. These functions require an investment of significant time and resources and range from establishing a case file to enforcing a support obligation. In addition, State and local agencies are responsible for locating absent parents, establishing paternity, establishing equitable support obligations, monitoring payments for compliance with orders, distributing collections, and safeguarding confidential information. The effective culmination of these efforts can minimize the use of court time since absent parents are more likely to pay child support if their cases are processed properly and expeditiously.

However, when cases go to court, attorneys and judges must rely on information gathered by the child support agency to protect the interests of both children and State. Conversely, the agency depends on the power of the courts to enforce child support obligations. To be effective, program attorneys must be familiar with the Child Support Enforcement Program as mandated by Federal law and regulations and the effect that the program has on the courts, children, and States, as well as taxpayers. The following is a discussion of how Federal regulations affect the Child Support Enforcement Program.

TITLE IV-A STATE PLAN REQUIREMENTS

Generally, the State welfare agency administers the AFDC program, as well as other financial assistance programs. The State or local agency administering this program is commonly known as the IV-A agency, since Title IV-A of the Social Security Act set up the AFDC program to provide financial assistance to families with dependent children. The AFDC program and the Child Support Enforcement Program are administered by States or localities pursuant to Federal guidelines. A review of some of the more relevant regulations will help explain the responsibilities related to child support of the IV-A agency.[1]

To receive Federal funds, the welfare agency and the child support enforcement agency each must have an approved State plan. A State plan is an agreement between the State and Federal Governments requiring the former to perform certain minimum duties in order to receive Federal funds. Also, there are child support-related requirements imposed on the welfare agency by Congress through statute and by the Department of Health and Human Services (DHHS) through regulations. These regulations are intended to ensure that all procedures used and information obtained result in enforceable cases. The welfare agency must gather information as part of determining the applicant's eligibility. An applicant's unwillingness to provide information can cause an immediate adverse effect on his or her financial assistance eligibility. (An applicant must show "good cause" for not providing such information. Good cause is defined at 45 CFR 232.40 and is discussed below.)

An applicant/recipient for AFDC must meet two child support-related conditions: assignment of rights to child support and cooperation in obtaining child support.

Assignment of Rights to Support

As a condition of eligibility for assistance, the IV-A agency must require each AFDC applicant or recipient to assign to the State all rights to past and present support from any other person. [42 USC 602(a)(26).] This assignment applies both to the applicant and to any other member of the family for whom assistance is being sought and to whom future payments will be made. The assignment includes arrearages due on the date the assignment becomes effective, in addition to current and future support. [45 CFR 232.11 and 45 CFR 302.50.] If the relative with whom a child is living fails to comply with this requirement, that relative is denied eligibility without regard to other eligibility factors. If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of this section, any aid for which such child is eligible will be provided in the form of protective payments. Protective payments are made to a third person to spend on behalf of the eligible child or children. An assignment by operation of State law may be used in lieu of the assignment described above. If there is a failure to execute an assignment, the State still may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations.[2]

Cooperation in Obtaining Support

The Title IV-A State plan must meet, inter alia, all of the following requirements:

- The plan must provide that, as a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate (unless good cause for refusing to do so is determined to exist) with the State in:
  - Identifying and locating the parent of a child for whom aid is claimed
  - Establishing the paternity of a child born out of wedlock for whom aid is claimed
  - Obtaining support payments for the applicant or recipient and for a child for whom aid is claimed
  - Obtaining any other payments or property due the applicant or recipient or the child.
- The IV-A State plan must specify that cooperation includes any of the following actions that are relevant to, or necessary for, the achievement of the objectives specified above:
  - Appearing at an office of the State or local IV-A or IV-D agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by the applicant or recipient

  - Appearing as a witness at judicial or other hearings or proceedings
  - Providing information or attesting to the lack of information under penalty of perjury
  - Forwarding to the child support agency any child support payments received from the absent parent after an assignment has been made.

- The IV-A State plan must provide that, if the child support agency notifies the State or local IV-A agency of evidence of failure to cooperate, the State or local agency will act upon that information to enforce these eligibility requirements.

- The IV-A State plan must provide that if the custodial relative fails to cooperate as required by 45 CFR 232.12, the State or local agency will:
  - Deny assistance to the custodial relative without regard to other eligibility factors
  - Provide assistance to the eligible child in the form of protective payments. Such assistance will be determined without regard to the needs of the custodial relative.[3]

- The IV-A State plan must provide an applicant for or recipient of AFDC with an opportunity to claim good cause for refusing to cooperate.[4] The State or local agency must notify such person, in writing, of the right to claim good cause as an exception to the cooperation requirement. The notice must:
  - Advise the applicant or recipient of the potential benefits the child may derive from establishing paternity and securing support
  - Advise the applicant or recipient that, by law, cooperation in establishing paternity and securing support is a condition of eligibility for AFDC
  - Advise the applicant or recipient that if the State or local agency determines that there is good cause, the applicant or recipient will be excused from the cooperation requirement.

The applicant or recipient must provide corroborative evidence of a good cause circumstance and, when requested, must furnish sufficient information to permit the State or local agency to investigate the circumstances. The State or local agency must provide, on request, reasonable assistance in obtaining the corroborative evidence. On the basis of the evidence supplied and the agency's investigation (if necessary), the State or local IV-A agency will determine whether cooperation would be against the best interests of the child.

Generally, the State IV-D agency will not attempt to establish paternity and collect support in those cases where the applicant or recipient is determined to have good cause for refusing to cooperate. However, the State IV-D agency may attempt to establish paternity and collect support in those cases where the IV-A agency determines that this can be done without risk to the applicant or recipient if done without his or her participation.

The IV-A agency's final determination that good cause does or does not exist will be in writing, contain the agency's findings and basis for determination, and be entered into the AFDC case record.

If the IV-A agency determines that good cause does not exist, the applicant or recipient will be so notified and afforded an opportunity to cooperate, withdraw the application for assistance, or have the case closed. Continued refusal to cooperate will result in the applicant's ineligibility for AFDC. The children involved will still be eligible for AFDC for their own needs; however, the children's grant will go to another person in the form of protective payments.

Circumstances under which cooperation may be against the best interests of the child are:

- Physical or emotional harm to the child for whom support is to be sought
- Physical or emotional harm to the parent or custodial relative with whom the child is living of such nature or degree that it reduces such person's capacity to care for the child adequately
- The child for whom support is sought was conceived as a result of incest or forcible rape
- Legal proceedings for the adoption are pending before a court of competent jurisdiction
- The applicant or recipient currently is being assisted by a public or a licensed private social agency to resolve the issue of whether to keep the child or relinquish him or her for adoption, and discussions have not gone on for more than 3 months.

TITLE IV-D PLAN REQUIREMENTS AND OPERATIONS STANDARDS

The State plan requirements and standards for program operations for IV-D agencies are found in 45 CFR 302 and 303. This section discusses mandatory caseload characteristics and the functional steps the IV-D agency takes as a case is processed.

Since the inception of the Child Support Enforcement Program in 1975, States and local agencies have been required to provide equal services to both welfare and nonwelfare families. In 1984, Congress reemphasized this responsibility by revising Section 451 of the Social Security Act [42 USC 651] to require specifically "that assistance in obtaining support will be made available under this part to all children (whether or not eligible for aid under Part A) for whom such assistance is requested."

In addition, Congress reinstated the States' responsibility to establish paternity and secure support for children in foster care who are receiving Federal assistance through Title IV-E of the Social Security Act. In 1980, Congress transferred the AFDC foster care program from Title IV-A of the Act to the newly created Title IV-E. Because the foster care program was no longer funded or administered under Title IV-A, the provision for assignment of support rights by AFDC recipients required by 42 USC 602(a)(26) no longer applied to foster care cases. This meant that Title IV-D child support enforcement services were not available for Title IV-E foster care cases except as non-AFDC cases. To receive IV-D services as a non-AFDC case, the child's parent, legal guardian, or the entity given custody of the foster child by the courts had to apply to the IV-D agency pursuant to 42 USC 654(6). To remedy this situation, Congress added 42 USC 671(a)(17) to require States to secure an assignment of support rights on behalf of children receiving foster care maintenance payments under Title IV-E and amended 42 USC 654(4)(B), 656(a), 657(d), and 664(a) to require IV-D agencies to collect and distribute child support for IV-E foster care maintenance cases.

Processing a Child Support Case

The steps a child support case goes through before it shows up in court are both numerous and complex. This section provides an overview of this preparation process; the specific tasks include eligibility determination, intake, locate, paternity establishment, support orderestablishment, monitoring, and enforcement. Exhibit 2.1 depicts the flow of cases through the separate functions.

Eligibility determination. New cases originate in one of three ways: (1) referral from the public assistance or foster care agency; (2) application from a non-public assistance recipient; and (3) referral from another State.

The IV-A or IV-E agency determines whether a public assistance applicant is eligible for AFDC or foster care. If the applicant is determined eligible, and there is a duty to pay child support by an absent parent, the case must be referred to the child support enforcement agency. The referral must contain an assignment of support rights and an agreement to cooperate, in addition to other pertinent information discussed below under "Intake."

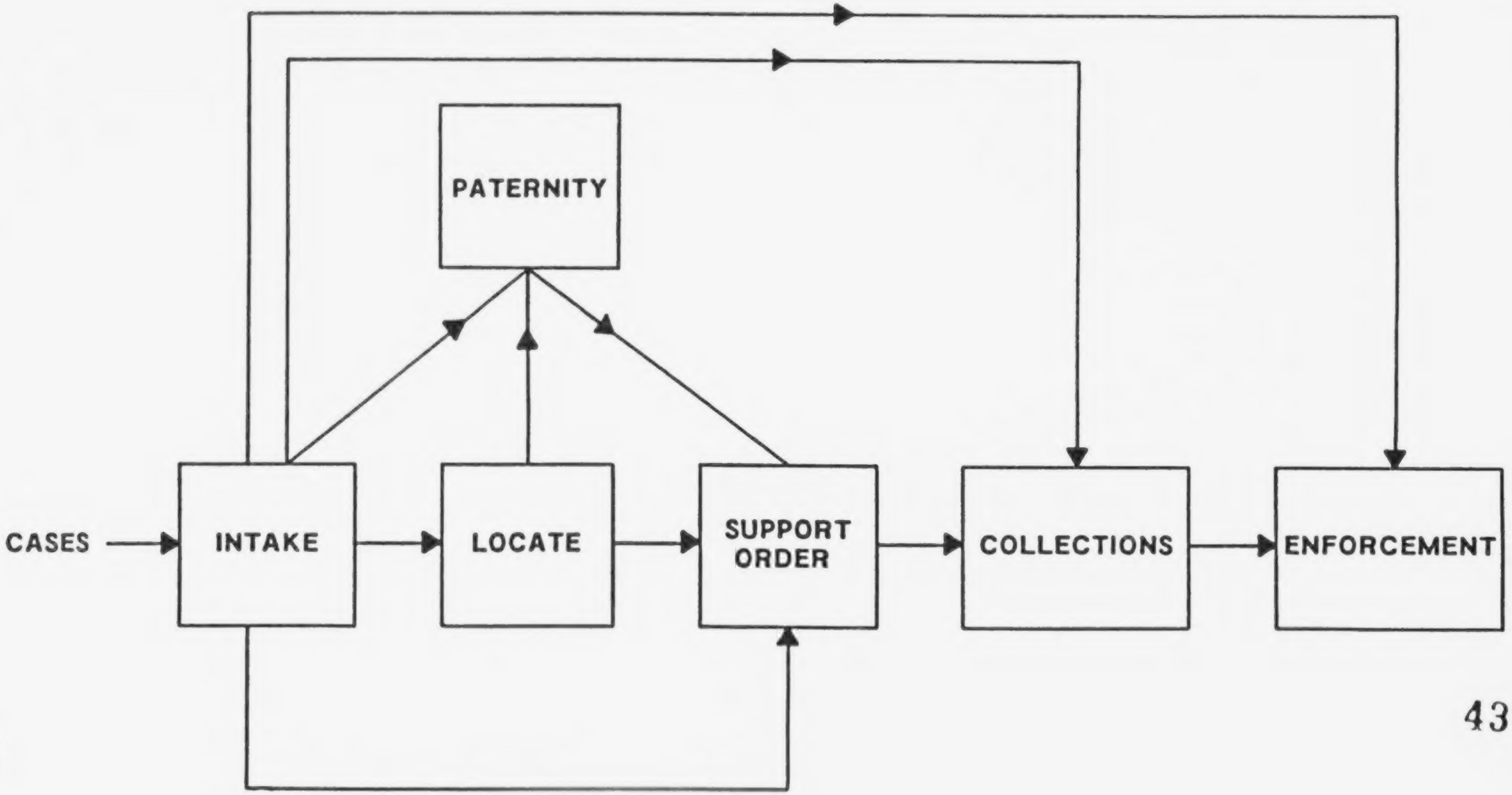
The assignment of support rights, completed by the applicant as a condition of eligibility, constitutes an obligation owed the State by the individual responsible for providing support. This obligation must be legally binding and, thus, must be established through an order of a court of competent jurisdiction or by other legal processes established by State law. Failure to execute such an assignment results in a denial of eligibility for assistance to the applicant, and any assistance to which dependent children are entitled must be made in the form of protective payments.

The State plan must provide that the same level of support enforcement services be provided to individuals not receiving public assistance that are provided to AFDC or foster care recipients. Such individuals, often referred to as non-AFDC clients, must file an application with the State IV-D agency or with other State or local offices the State IV-D agency has authorized to accept non-AFDC applications on its behalf. Under P.L. 98-378, the State must charge an application fee, not to exceed $25. 45 CFR 302.33 allows the State the option of charging the fee to the applicant or paying the fee out of State funds. Either way, the State may seek to recover the fee from the absent parent in order to repay the applicant or itself. 45 CFR 302.30 requires that States publicize the availability of child support enforcement services, including any application fees that may be imposed for non-AFDC.

Interstate cases may be referred by other States using several procedures. The State where the family resides may request the State where the absent parent resides or works to withhold his or her income in order to enforce an instate or out-of-State support

Exhibit 2.1

CHILD SUPPORT CASEFLOW DIAGRAM


PATERNITY
CASES
INTAKE
LOCATE
SUPPORT ORDER
COLLECTIONS
ENFORCEMENT

order. The initiating State may request the responding State to establish and/or enforce an obligation through use of the Uniform Reciprocal Enforcement of Support Act (URESA). If an order exists in the absent parent's jurisdiction, the initiating State may simply request the absent parent's jurisdiction to enforce it using available remedies.

Intake. Once the child support enforcement agency receives the appropriate forms from the welfare agency, the non-AFDC applicant, or another State, a case record must be established. The information needed to open a child support case includes:

- Information on the custodial family
- Information on the absent parent
- An executed assignment of support rights or non-AFDC application.

The intake function consists of compiling the data received from the above sources along with other information available to the child support enforcement agency. Some States have designed and implemented automated computer interfaces to augment the information available to the child support enforcement worker during the intake process.

Preparation of an accurate and complete case record is very important to the child support enforcement process. Later action on the case often depends on information collected at this point in the case processing sequence. In addition, a well prepared case minimizes the use of judicial time, establishes a verifiable audit trail, and generally helps the system operate effectively.

Locate. During case preparation, the child support enforcement worker will try to verify an address for the absent parent. If the worker cannot verify an address, Federal law requires that the child support enforcement agency attempt to locate the absent parent. If necessary, these locate efforts must extend across State lines, and the out-of-State agency must assist in the effort.[5]

There are three levels of location efforts--local, State, and Federal. Except for requests from other States, location efforts begin at the local child support enforcement office. The request for locate services may be made by a court with jurisdiction to issue child support orders, the caretaker parent or agent of a child not receiving public assistance, or the agency seeking to collect child support payment.[6]

Local locate efforts involve all community sources of information on the absent parent. The best local source is the custodial relative. If the custodial relative is an AFDC recipient, he or she must cooperate and reveal this information as a condition of AFDC eligibility.[7]

To contact these sources, the child support enforcement agency must establish a working relationship with all appropriate local resources.[8] Some of these sources may be reluctant to cooperate because of the Privacy Act. To encourage the source to reveal the information, the child support enforcement worker or attorney should explain the purpose of the IV-D Program and its confidentiality requirement for safeguarding information. Also, many State statutes require that this information be provided to the IV-D agency. Portions of the Child Support Enforcement Amendments of 1984 contain such requirements, applicable to private entitites such as employers.

The State also must have a State Parent Locator Service (SPLS) to contact State agencies that may have information concerning the location of the absent parent.[9] The SPLS should have contacts with all appropriate State agencies, but at least contact with those agencies that maintain records concerning:

- Public assistance and social services
- Driver's licenses and vehicle registration
- Employment
- Revenue
- Law enforcement.

To check these records, the SPLS generally must have the absent parent's Social Security number and his or her date and place of birth. Also, the SPLS acts as a clearinghouse for interstate locate efforts. The SPLS submits and receives requests to locate an absent parent who is residing in a State other than the one where the child and caretaker parent reside. Under a Federal requirement of cooperation, the SPLS receiving such a request must take steps to locate the absent parent and notify the State that initiated the request concerning the search results. Federal locate efforts are discussed in Chapter 1.[10]

Paternity establishment. Paternity establishment is very important to the Child Support Enforcement Program. Of the children born out of wedlock who live and are not adopted, approximately 60 percent receive welfare. This results in a high expenditure of AFDC, the taxpayer's burden. In addition, national demographic trends demand that child support enforcement programs place high priority on establishing paternity.[11]

How a paternity case is intiated depends on whether or not the mother is receiving AFDC. Although a woman who is not a recipient of AFDC is under no legal obligation to establish the paternity of her child, she can apply to the child support enforcement agency for use of its services in attempting to establish paternity. According to the Child Support Enforcement Amendments of 1984, the IV-D agency may charge an application fee of not more than $25 for these services in non-AFDC cases. On the other hand, AFDC and foster care recipients are required by law to cooperate in locating and identifying the parent of the child for whom aid is requested or to establish good cause for refusing to do so.

Assessment/Establishment. If no existing court order determines the amount of the support obligation in a case, the State must make a financial assessment of the amount of the obligation under a formula or guideline developed by the agency.[12] This financial assessment is used to recommend an amount of legal obligation pursuant to a consent agreement or an administrative determination.[13] The court also may use the assessment as a guide when setting the amount of the obligation in the court order. Under 45 CFR 302.56, the child support enforcement agency must establish specific and numeric guidelines, by law or judicial or administrative action, for setting child support award amounts within the State. By October 1, 1987, these guidelines must be made available to all persons in the State whose duty it is to set child support award amounts, but the guidelines need not be binding.

The assessment generally is conducted through contacts with the absent parent (when the individual will cooperate), the caretaker parent, the current or past employer, credit agencies, banks and other lending institutions, and insurance companies. This investigation serves several useful functions. It forms the basis of an administrative order or stipulation setting the amount of a legal obligation. Many IV-D agencies attempt to negotiate consent orders with the responsible parent prior to referring cases for legal action. Finally, if a consent agreement is not reached, the investigation can provide program attorneys with valuable information to use in fashioning a recommended amount, which the court may consider entering in the support order.

Sometimes an order of support can be established with the cooperation of the absent parent; other times a court or administrative hearing is necessary. If the parent must be summoned to court and does not appear, the order may be established by default. Under the Child Support Enforcement Amendments of 1984, all newly established or modified support orders must include a mandatory wage withholding provision as an automatic and preferred enforcement technique should the absent parent become delinquent in paying child support.

Monitoring/Enforcement. Accurate monitoring of child support payments is essential to the enforcement of the obligation, especially since it can help prevent the accumulation of arrearages. Under the State plan, the IV-D agency must maintain an effective system for identifying, within 30 days, those cases in which there is a failure to comply with the established support obligation, and contact delinquent individuals as soon as possible in order to enforce the obligation and obtain the current support amount plus any arrearages. Pursuant to 45 CFR 302.75, the IV-D agency may impose a late payment charge of not less than 3 percent or more than 6 percent of overdue support.

The mandatory wage withholding procedures required by the Child Support Enforcement Amendments of 1984 will have a major impact on agency enforcement tactics. Under the new law, all new or modified support orders must contain a provision for withholding wages as a means of collecting child support. Withholding will go into effect--without the need for any amendment to the support order involved or any further action by the court or administrative agency--once the arrearage equals 30 days support. (Mandatory wage withholding is discussed in detail in Chapter 8, and interstate wage withholding is discussed in detail in Chapter 10.)

Even without a wage withholding provision, the child support enforcement agency should attempt to secure voluntary compliance before relying on administrative or judicial enforcement. These initial nonjudicial enforcement techniques can minimize the use of court personnel and attorneys. If the nonjudicial enforcement techniques are unsuccessful, the child support enforcement agency must be ready to use its or a court's authority quickly to enforce the obligation and establish regular payments.

Numerous methods can be employed to encourage delinquent absent parents to comply with their financial obligations. These methods include but are not limited to interviews, personal contacts, telephone collection calls, billing systems and delinquency notices. A child support enforcement agency bases its selection of a particular technique on a consideration of case characteristics, such as past payment history, age of the established obligation, date since the last payment was received, location, income, and resources available to the absent parent.

Attempts to collect support must include the following procedures as applicable and necessary:

- Automatic mandatory wage withholding pursuant to 45 CFR 303.100
- Withholding of unemployment compensation benefits pursuant to 45 CFR 302.65
- Contempt proceedings to enforce an existing court order where it can be shown that the support obligor had the ability to pay support but refused to do so
- Interception of State and Federal income tax refunds pursuant to 45 CFR 303.102 and 45 CFR 303.72
- Garnishment or similar proceedings if the State's statutes permit such a procedure and if the individual can be brought under the jurisdiction of the court
- Proceedings to establish liens on real and personal property pursuant to 45 CFR 303.103, where appropriate
- Proceedings to attach real or personal property if the State's law provides for such a procedure and the individual is subject to such procedure
- Proceedings to require an obligor to post security or a bond or give some other guarantee to secure payment pursuant to 45 CFR 303.104, where appropriate
- Proceedings to secure and enforce medical support obligations pursuant to 45 CFR 306.51
- Reports to consumer reporting agencies regarding an obligor's overdue support, pursuant to 45 CFR 303.105
- Applications to use the Federal courts of the United States and proceedings to enforce an order in the Federal courts of the United States if such application is certified pursuant to 45 CFR 303.73
- Application for collection of the delinquent child support obligation by the Secretary of the Treasury.[14]
- Any other collection or enforcement procedure described in the State plan.

Maintaining Case Records

In addition to carrying out the above activities, Federal regulations require the State or local IV-D agency (including subcontracting agencies) to keep careful records. The elements of a complete case record include, pursuant to 45 CFR 303.2, the following:

- The referral documents received from the IV-A agency or the application for IV-D services by another individual

- Records of any contacts with (1) an applicant or recipient of assistance under Title IV-A who is required to cooperate, (2) an individual who has applied for service, and (3) the absent parent and the date, reason, and result of these contacts
- Records of efforts to use local, State, and Federal locate resources and the dates and results of these efforts
- Records of any information collected on medical support as listed in 45 CFR 306.50(a)
- Records identifying the court order or, if there is no court order, the calculation of the amount of the obligation using the formula prescribed in the State plan
- Records of any actions taken as outlined in 45 CFR 303.3 through 303.6, including the dates and results thereof
- Records of communications to and from the State or local agency administering the State's Title IV-A plan, the OCSE Regional Office, and any other IV-D agencies
- Notation in the case record of the closing of the case, including the date thereof and the reason for taking the action.[15]

An agency that prepares cases accurately and takes timely enforcement measures can reduce court backlogs. Rapid enforcement of child support obligations conditions the absent parent to avoid the inconvenience of court appearances by making regular child support payments.

Distributing Collections

In AFDC cases, the recipients must assign to the State any rights they have to support from any other person in their own behalf or in behalf of any other family member for whom assistance is being paid.[16] The assignment includes all rights which have accrued at the time the assignment is made, including all arrearages due and collectible on that date. As a result of these assignments, IV-D agencies become possessed of support collections each month which are attributable to AFDC cases and which must be distributed according to Federal regulations. The distribution process is described below.

In non-AFDC cases, there is no requirement that the support obligee assign his or her support rights to the State. Nevertheless, many States have found that it greatly increases the quality of their recordkeeping and the efficiency of their case-processing procedures to require absent parents to make their support payments to the IV-D agency, or to the court which entered the support order. Such a requirement may be imposed by statute, by judicial rule, or by way of a voluntary assignment of support rights for the purpose of collection. In these States, the IV-D agency or the court must pass the support collection through to the family in a timely fashion. 45 CFR 302.57 sets forth requirements with which a State must comply in order to set up a payment processing system for non-AFDC cases. The State may charge the requesting parent a fee, not to exceed $25 annually and not to exceed State costs.

Distribution of collections in AFDC cases for which there is an assignment under Section 471(a)(17) of the Act is covered by 42 USC 657 and 45 CFR 302.51. Under these provisions, the first $50 collected that represents payment on current support due in a given month is forwarded to the family pursuant to 42 USC 657(a)(1). Amounts in excess of the first $50 of current support are retained by the State to reimburse itself for the AFDC paid to the family for the month in question. Any remaining amount of current support collected is paid to the family. If the amount collected exceeds the current support obligation, the State retains such amounts to reimburse itself for AFDC paid to the family for "any sequence of months for which it has not yet been reimbursed."[17] Once it has been reimbursed in full, the State distributes the remainder of the collection to the family. Also, the family's eligibility for public assistance will be redetermined by the IV-A agency pursuant to 45 CFR 232.20. The $50 pass-through, which only applies to current support, then does not apply when the collection remedy is Federal or State tax refund offsets.

The distribution sequence in foster care cases follows a slightly different pattern. The foster care agency "stands in" for the family. 45 CFR 302.52 requires that payments that normally would be forwarded to the family be paid to the State agency responsible for supervising the child's placement and care. That agency may set aside such amounts for the child's future or make all or a part of the money available to the child's caretaker for meeting the child's daily needs.

Safeguarding Information

Safeguarding information is an extremely sensitive area because U.S. citizens have a right to privacy. Privacy is a unique interest primarily for what it is not. Privacy is not an economic or even a tangible interest. It is not among the necessities of life. It does not necessarily guarantee the right to engage in or refrain from any particular activity. Rather, privacy is a conceptual interest arising from an expectation of how government will ensure that an individual may hold himself free from public scrutiny if he so chooses. The freedom from unwarranted publicity is said to exist only so far as its assertion is consistent with law or public policy.

Privacy is akin to the expectation interest of equality. Individuals expect government to treat those governed equally or to leave them alone altogether. The privacy right is not an explicit guarantee of the Constitution but is a contextual right that emanates from the First, Fourth, Fifth, and Ninth Amendments. Neither privacy nor equality can be viewed as independent "rights" or "interests," but rather each rises to the level of constitutional significance only within certain factual contexts. Privacy requires a wholly qualitative assessment of the interests affected by the governmental intrusion, with a relatively undefined balancing of interests as the vehicle for arriving at a result.

To be constitutionally protected, privacy must be considered a fundamental right. In fact, few aspects of an individual's life are considered essential, and therefore, protected from government intrusion, regulation, or prohibition. Interests such as speech, thought, sex, education, and family, however, have been consistely set apart as meriting special consideration. Courts have held that these interests are so fundamental that they are likely to continue being the basic concerns of human society even though times and other customs change.

The consitutional right to privacy should be distinguished from the confidentiality and safeguarding of information requirements of the Social Security Act. The social security confidentiality requirements are sometimes thought of as the "protection of rights to privacy." There is no constitutional safeguard of absolute privacy in child support cases. In fact, the opposite may be true. The taxpayers have a basic right to know where their dollars are going. In the early stages of the public assistance program, many wanted lists of welfare recipients to be published. Unfortunately, little consideration was given to the children who could suffer when the custodial parent would not accept public assistance because of the potential public scorn. Times changed, and so did attitudes. It was determined that the public interest in providing for children was more important than the public's right to know who applied for welfare. The reasoning was that people are poor through no fault of their own and, contrary to their own desires, must rely on public aid. Because they are honorable people for the most part, they should not be exposed to public ridicule. The children at any rate are innocent bystanders who should be protected. This is not a protection of a basic right of privacy, but is rather a specialized confidentiality requirement adopted for the good of the children in these specific cases. If the requirements are not followed, a State program maybe found to be out of compliance and sanctions applied.

Section 402(a)(9) of the Social Security Act (Public Law 93-647) requires State plans to "provide safeguards which permit the use or disclosure of information concerning applicants or recipients only to (a) public officials who require such information in connection with their official duties or (b) other persons for purposes directly connected with the administration of aid to families with dependent children."

As described in 45 CFR 303.21, the child support enforcement agency must establish criteria, in accordance with State statutes, which impose legal sanctions on the misuse or improper disclosure of information concerning applicants or recipients of child support enforcement services. In addition to child support-related activities, case information may be used for the following activities:

- Any investigations, prosecution, criminal, or civil proceeding conducted in connection with the administration of any such plan or program approved under Part A, B, C, or D of Title IV; under Titles II, X, XIV, XVI, XIX, or XX; or under the supplemental security income program of Title XVI.

- The administration of any other Federal or federally assisted program that provides assistance, in cash or in kind, or services directly to individuals on the basis of need

- These safeguards shall specifically prohibit disclosure to any committee or legislative body (Federal, State, or local) of any information that identifies by name or address any such applicant or recipient of public assistance.

THE CHILD SUPPORT ENFORCEMENT PROGRAM AND THE STATE COURT SYSTEM

The ultimate goal of the Child Support Enforcement Program is to ensure that the responsibility for supporting children rests with the responsible parents, and, thereby, to diminish the demand for tax dollars. To meet this goal, State and local agencies must adhere to stringent legal requirements.

Given these requirements, child support enforcement agencies invest significant time and resources to enforce the payment of child support by the responsible absent parent. In some cases, the child support agency's activities result in an admission by the absent parent that he or she is responsible for paying child support, saving valuable judicial time. However, some cases require litigation. In these instances, the effectiveness of the child support enforcement agency's efforts depend on fair and equitable action by the court. Child support enforcement attorneys and other program personnel have the responsibility to educate judges and other court personnel who must back the program's efforts with appropriate judicial remedies. The remainder of this Handbook is devoted to describing that responsibility and identifying relevant substantive and procedural considerations.[16]

FOOTNOTES

/1/ Portions of this chapter are based on Lavon D. Loynd, J.D., Effective Enforcement Techniques for Child Support Obligations (Chevy Chase, MD: National Institute for Child Support Enforcement, 1981), pp. 55-64; Chester H. Adams, J.D., et al., A Guide for Judges in Child Support Enforcement (Chevy Chase, MD: National Institute for Child Support Enforcement, 1982), pp. 1-37. Lavon D. Loynd, J.D., Dennis C. Cooper, M.P.A., and Athena M. Kaye, Establishing An Enforceable Case (Chevy Chase, MD: National Institute for Child Support Enforcement, 1981), pp. 3-13.

/2/ 45 CFR 232.11(c).

/3/ 45 CFR 232.12.

/4/ 45 CFR 232.40 et seq.

/5/ 45 CFR 303.7.

/6/ 42 USC 653(c).

/7/ If the caretaker refuses to cooperate, assistance may be denied or placed in protective payments. [45 CFR 232.12 (d), 234.60.]

/8/ 45 CFR 303.3(b).

/9/ 45 CFR 302.35.

/10/ 45 CFR 303.3 and 45 CFR 303.7.

/11/ U.S. Bureau of the Census, Child Support and Alimony: Current Population Reports, Report 112 (Washington, DC: U.S. Bureau of the Census).

/12/ 45 CFR 302.53.

/13/ 45 CFR 302.50.

/14/ 45 CFR 303.50.

/15/ 45 CFR 232.11.

/16/ 45 CFR 302.51(b)(4).

/17/ 45 CFR 303.2.

CHAPTER 3

The Role of the Attorney In Child Support Enforcement

INTRODUCTION

> A lawyer is a legal representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
>
> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client, but consistent with the requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesman for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

Above are the first two paragraphs of the preamble to the American Bar Association's Model Rules of Professional Conduct, Final Draft (herein called "Model Rules").[1] The quotation effectively categorizes the functions, or roles, that an attorney performs as part of his or her profession. All of the roles mentioned above have relevance to attorneys employed by the Child Support Enforcement Program to represent the interests of the State and of custodial parents and their children.

The Attorney as Advisor

The extent to which a child support enforcement attorney performs the role of advisor will vary from one jurisdiction to the next and will depend on the amount of contact the attorney has with the IV-D agency. Attorneys employed directly by the agency are often in the policy-making loop and are actively involved in the program in an advisory capacity. Attorneys who serve the program on a contract basis, or who are tied to the program by statute, such as prosecuting or district attorneys, may be less involved in providing legal advice to program administrators. The latter group often advise program administrators by serving on ad hoc advisory committees or by providing day-to-day feedback on specific cases. In many instances, the attorney will be in a position to give legal advice to custodial parents in the process of working a case.

The Attorney as Investigator

While the child support enforcement attorney typically has a wealth of investigative support upon which to draw, some investigative functions can be performed only by an attorney. Once an action is pending, the attorney has discovery devices and subpoena power, investigative tools generally not available to administrative personnel. In addition, the attorney often can obtain information from private, outside sources (such as employers) by citing legal authority as the basis for the request and by lending to the effort an added degree of credibility. Attorneys routinely perform other investigative functions that may be carried out most effectively and efficiently by the attorney in conjunction with other activities. For instance, in preparing to take a contested paternity case to trial, the attorney often conducts a more detailed interview with the mother and other witnesses.

The Attorney as Negotiator

Because the program lacks sufficient resources or available court time to take a significant percentage of child support cases to court, the child support enforcement attorney must be adept at negotiating contested situations into workable resolutions. The attorney commonly serves as intermediary between or among the separate governmental agencies which must work together to make the program effective and efficient. These functions often require a delicate balance between the interests of the IV-D program and the people with whom the program comes into contact. The ethical problems associated with negotiation are perhaps the most serious and difficult to resolve of any the child support attorney faces.

The Attorney as Advocate

As advocate, the attorney is the legal representative of the IV-D agency, the State, and, indirectly, the custodial relative and the child. The attorney must be keenly aware of all relevant statutory and case law which exist in the jurisdiction. The attorney must analyze facts to determine the most effective and appropriate course of action or remedy for each case, and then carry out the necessary legal steps to bring the power of the court to bear on the problem. As advocate, the attorney has a duty to afford the IV-D agency the opportunity to appeal cases which are decided in error and, perhaps, thereby create new law.

The Attorney as Officer of the Court

As an officer of the court, the attorney has a responsibility to protect the court from abuse of its processes, to take an active role in educating the judiciary regarding the law and public policy that should be applied to child support cases, and to be constantly seeking innovative ways to improve the legal system in the jurisdiction.

The Attorney as Public Official

As noted above in the preamble to the Model Rules, all attorneys have a special responsibility of citizenship, based on their proximity to the legal system and their special training, to foster the quality of justice. This responsibility applies to government attorneys with additional weight because of their direct involvement in the administration of a government program. The child support attorney has a responsibility to the legislature to assure that the goals of the program are carried out, and a duty to the public at large to protect the rights of individual citizens.

This chapter will discuss each of these roles and apply the ethical standards contained in the new Model Rules to common fact situations and ethical dilemmas faced by the child support enforcement attorney. The Model Rules inform the chapter because the Bar's own ethical considerations are the most authoritative guide to the attorneys in fulfilling their function on behalf of clients.

WHO IS THE CLIENT?

The most fundamental issue for consideration, is "who is the client?" As many writers in the field of legal ethics have pointed out, this issue may appear simple but can be very difficult for attorneys who work for large organizations or government agencies.[2/]

The typical corporate or government attorney always deals with the corporation or agency through an intermediary, that is, a human being. It is not always clear to the attorney whether the client is the intermediary, some subdivision of the organization as a whole, the entire organization, its top management, or even the constituents whom the management represents (shareholders or taxpayers). Conflicts can arise among the interests of these various potential clients which put the attorney in a very uncomfortable position.

The child support enforcement attorney faces an additional layer of uncertainty due to the presence of another individual--the custodial relative. The question naturally arises as to whether an attorney-client relationship exists between the attorney and the custodial relative. If so, many ethical considerations would affect the way the IV-D attorney conducts negotiations, makes tactical decisions as to which remedies or causes of action should be pursued, maintains client confidences, and resolves conflicts between the interest of the custodial relative and the State.

In the first decade of the Child Support Enforcement Program, courts and bar ethics tribunals only rarely dealt with the issue of client identification. However, more recently, judges have considered the issue as absent parents attempted to avoid collection actions by challenging the State's involvement in the Program. The argument can be made in a number of ways, but the most popular involves equal protection. This argument posits that by providing legal counsel for custodial parents but not for absent parents, the State violates the absent parent's right to equal protection. The same argument can be based on State constitutional provisions prohibiting legislatures from spending public monies to effect private purposes. Both of these arguments have failed. [See Florida Department of Health and Resources v. Heffler, 382 So2d 301 (Fla. 1980); State ex rel. Leet v. Leet, 624 SW2d 21, (Mo. 1981); Johnson v. Johnson, 634 P2d 877 (Wash. 1981).]

In these cases, the courts found no constitutional violation because the States involved were not motivated by a purpose to provide legal services to the custodial parents. Federal and State statutes created the Child Support Enforcement Program to further the compelling public interest in "safeguarding the child's constitutional rights, protecting the taxpayers, and assuring that the primary obligation for child support falls on the parents." [Johnson, supra, p. 881.] Viewed in this light, the attorney's function in all IV-D cases is to further those public interests, not to represent the narrower interests of individual custodial parents.

A number of bar ethics committees have taken up the issue in response to questions from members of the bar. The questions generally refer to the conflict of interest that arises from time to time when a IV-D attorney becomes aware that a custodial parent who is receiving AFDC was ineligible for a period of time. Bar ethics opinions from the

States of Oregon, Missouri, and Tennessee[3] have held that the attorney in a IV-D case represents the State and not the support obligee; therefore, there is no impropriety in informing the proper authorities concerning welfare fraud. Likewise, a 1967 opinion of the North Carolina bar ethics committee held that no attorney-client relationship existed between the public prosecutor and a custodial parent receiving support enforcement services pursuant to a program established prior to the passage of Title IV-D of the Social Security Act.[4]

Similarly, in Gibson v. Johnson, 35 Or.App.493, 582 P2d 452 (1978), the Oregon Court of Appeals held that no attorney-client relationship exists between the child support enforcement attorney and the AFDC recipient. In Gibson, a class action was brought on behalf of all AFDC recipients, seeking the entry of a mandatory injunction. The injunction would have enjoined attorneys from the Oregon Department of Justice from representing AFDC recipients in child support proceedings without first conforming to the disciplinary rule that requires the lawyer to decline multiple representations unless he or she can represent each client adequately without conflict of interest and make full disclosure of any potential conflict. The trial court found the rule applicable and entered an injunction. On appeal, the court held that the relationship between the AFDC recipient and the State is one of assignor-assignee, not attorney-client. The involuntary nature of the relationship, and the fact that the State is collecting support principally to offset the costs of AFDC, were the deciding factors, despite statutory language which spoke of "representation of the child, or children, caretaker parent, other dependent person, or the Department of Human Resources." [See ORS 23.789 (2).]

The issue surfaces in one other context in a remarkable opinion from New York State. There, the bar ethics committee held that it was not an ethical violation for the alleged father's attorney in a pending paternity case to contact the AFDC recipient-mother directly (i.e., without notifying the relevant public attorney) in an attempt to obtain a statement to exonerate his client.[5] Again, the rationale was that the absence of an attorney-client relationship between the AFDC recipient and the public attorney prevented application of normal ethical standards. Had the relationship been held to exist, the alleged father's attorney would have been prohibited from contacting the AFDC recipient except through the public attorney.

The authorities on this issue agree that the only attorney-client relationship arising in the normal IV-D context exists between the attorney and the agency for whom he or she works. Unfortunately, the decisions cited above contain little analysis to allow the reader to decide on their merits. Moreover, all of the decisions and opinions which are directly on point involve AFDC cases, with no criteria for extending their applicability to other fact situations.

As a general rule, the client is the party with whom the attorney has the longest term professional relationship, the party who initiates or monitors that relationship, or perhaps the party to whom the attorney looks to get paid. One other measure would involve policymaking authority granted by the legislature. Normally, the client retains the authority to decide whether or not to pursue a legal remedy, after the attorney provides the client with an opinion. If the legislature has vested an executive agency with the authority to administer the IV-D program, and therefore to decide which cases are referred to the attorney for legal action, then the executive agency would be performing the traditional client function. If, on the other hand, the legislature has delegated the function of administering the program directly to the county, district, or State's attorney, then the client might be that individual or office, to the same extent as in criminal prosecution cases.

In either case, the custodial parent, to a large extent, has been divested of control over whether or not an enforcement or establishment action will be taken. While this is less true for non-AFDC cases, the IV-D agency (or the local public attorney acting in the role of the IV-D agency) still initiates the relationship between the custodial parent and the attorney, and controls the priority to be granted the case. In both situations, the agency decides whether legal resources will be brought to bear on a case and how much will be spent on each case. Again, the agency seems to be functioning in the role of the client.

SPECIFIC ETHICAL PROBLEMS

Competence

Model Rule 1.1 requires the lawyer to provide competent representation to his or her client. Competent representation is defined as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In the comment to the Rule, ABA's Commission on Evaluation of Professional Standards states that "competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also requires adequate preparation."[6]

This level of competence in the child support enforcement field requires a diverse amount of knowledge and several different skills. The attorney must be fully aware of the substantive and procedural issues which may arise as a case is worked, and how to apply his or her jurisdiction's case law, court rules, and statutes to resolve such issues in the client's interest. In addition, the attorney absolutely must be aware of Federal statutes and regulations which affect the implementation and administration of the IV-D Program in his or her State. Included in the list of relevant sources are the following:

- Federal and State Constitutions
- Social Security Act [42 USC 601 et seq.]
- 45 CFR 300-399
- Bankruptcy Code [11 USC 362, 522, 523(a)(5)(A)]
- Internal Revenue Code [26 USC 6305 and 6402(c)]
- Soldiers' and Sailors' Civil Relief Act [50 USC Appendix 520]
- Federal Consumer Credit Protection Act [15 USC 1671-1675, 1681 et. seq.]
- State dissolution of marriage statute
- Uniform Reciprocal Enforcement of Support Act
- Uniform Child Custody Jurisdiction Act
- State IV-D implementing legislation

- State creditors' remedies
- State exemption statutes
- State probate law and procedure
- Applicable statutes of limitation and dormancy and revival statutes.

In addition to acquiring a thorough knowledge of the above, the IV-D attorney must understand the underlying purpose of each and their connections to the goals of the child support enforcement effort. For the most part, the enforcement of child support obligations is consistent with the public policy behind these other enactments. When two areas of public policy collide, the attorney must apply sound legal reasoning to help the executive or judicial branches resolve the conflict. Such thorough knowledge develops only with the study of the case law which construe the statutes. With regard to the Federal statutes and regulations and the uniform acts, it is necessary to study the case law from all jurisdictions in the country.

The most important skills that must be developed involve interviewing, negotiation, and trial practice. Negotiation is such an integral part of the lawyer's role that it is recognized as an area in which the attorney must exhibit a high degree of competence. [See 42 Tex.B.J. 439 (1979).] Clearly, this is particularly true for the child support enforcement attorney who must process a large caseload in an efficient manner.

Paternity cases, in particular, test the attorney's trial practice skills. To comply with Rule 1.1, all child support enforcement attorneys must develop knowledge and skill in trial practice and in the scientific basis of genetic paternity testing.

Once the requisite knowledge and skills are obtained, the attorney must apply them to individual cases. This requires devoting adequate preparation time to cases prior to taking action. Finding time to prepare can be challenging when caseloads are high, as is often the case. Nevertheless, the child support enforcement attorney has an ethical obligation to bring competent representation to each case. The Model Rules make no exceptions for heavy caseloads.

Scope of Representation

Model Rule 1.2 emphasizes that the client has the "ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."[7] Model Rule 1.13 states that "a lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents." Most State legislatures have delegated the policymaking functions in the IV-D program to the social services or revenue agency. Thus, one can argue that the child support attorney should yield to the decisionmaking authority of program management, except where a decision requiring legal expertise is involved or where the management clearly is acting outside the "limits imposed by law."

The Commission's comment further points out that the attorney should "assume responsibility for technical and legal-tactical issues, but should defer to the client regarding such issues as the expense to be incurred and concern for third persons who might be adversely affected." Certainly, this last clause applies with less force to the government attorney, who must act as a "minister of justice" in addition to more traditional roles. Nevertheless, the ethical consideration has significant ramifications for the child support enforcement attorney.

A good discussion of the proper relationship between government counsel and the agency he or she represents may be found in Dean Redlich's "Professional Responsibility of the Lawyer in Government Service."[8] In this article, Dean Redlich uses the facts of the famous case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to analyze the role of the attorney in advising the government client. The facts in Marbury do not translate sufficiently to the IV-D attorney's situation, so the discussion here adapts Redlich's analysis to a more familiar situation.

Redlich encourages the government attorney to decide whether he or she is a "hired gun" or a "policymaker," and concludes that the proper role falls somewhere in-between. He labels this role "gatekeeper." As gatekeeper, the attorney allows the policymakers to set policy, but encourages them to apply the legal advice which he or she is competent to provide. Once policy is set, the attorney interferes in its implementation only where it infringes on his or her right to state a professional opinion, or where implementation clearly would violate the constitutional rights of affected third parties.

Examples provide a clearer understanding of this concept. Assume that the State legislature enacts a State income tax refund interception statute that provides that "any liquidated debt, whether or not reduced to judgment," may be collected through setoff. Assume further that a State or local administrator asks the attorney to research and determine whether the statute may be used to collect unreimbursed AFDC from absent parents against whom no support order has been established. The attorney conducts extensive research and concludes that the absent parent's obligation to reimburse the State for AFDC paid to his family does not constitute a "liquidated debt" and that the statute cannot be used for such a purpose.[9] Lastly, assume that before the attorney can issue an opinion, the administrator informs the attorney that his or her opinion must be that the statute may be used.

Redlich says that the attorney in such a situation should stand by his or her professional opinion and refuse to issue the opinion mandated by the administrator. Here, the client, through its representative, has attempted to infringe on the attorney's professional opinion. According to Rule 1.1, the attorney should exercise his or her independent judgment.

The rule is more difficult to apply, and the example a bit more credible, if the facts are slightly different. Assume this time that the IV-D Director allows the attorney to state his opinion. Instead of arguing or trying to dictate the attorney's professional opinion, the administrator simply says, "Fine. I respect your opinion, but this issue is very important to the program in this State, too important to allow a single opinion to control the way in which we implement the debt setoff mechanism. I want you to draft a request for an attorney general's opinion in which you put forward the best legal argument you can devise for extension of the mechanism to the non-court-ordered caseload." Redlich concludes that, in this situation, the attorney should comply with the request. He notes that, for the purposes of this situation, the agency alone is the client, and the attorney is the only source of legal expertise available to the agency. Since refusal to draft the request effectively denies the agency the use of the remedy, the attorney has a duty to comply.

Now assume that after the administrator asks for the attorney's opinion, he simply states that the IV-D agency intends to implement the debt setoff mechanism on cases where there is no court order, despite the attorney's opinion that to do so would violate absent parents' due process rights. This is a particularly difficult situation for many attorneys in government service. As a general rule, a client should be allowed to ignore his or her attorney's opinion, even when to do so would be clear folly. This principle applies to the government attorney-client context with almost the same force as in the wholly private context with one important exception.

The government attorney is also a public official, with a responsibility to the public at large and a professional obligation to the agency paramount to his or her responsibility to any individual administrator. Model Rule 1.13 specifies a number of appropriate responses for the attorney who knows that an individual in the organization is intending to enter into action that violates the law and is likely to result in substantial injury to the organization. The attorney can make internal requests for review, except where the organization's highest authority insists upon taking action which is clearly illegal. At that point, the lawyer may reveal information to higher governmental officials. It is noteworthy that the list of appropriate responses does not include a refusal to provide legal services to the administrator in defense of his or her action. Where the attorney believes that his or her participation in the action would be itself unethical, the attorney's only alternative would appear to be resignation.

Communication

Model Rule 1.4(a) states that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Subsection (b) requires the attorney to explain any such "matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Most attorneys serve the child support enforcement community through cooperative agreement with the State or county IV-D agency. The IV-D agency typically investigates the facts in a case and refers the matter to the attorney if legal action is appropriate. In States where the attorney general's office is the IV-D agency, the referral will be an in-house procedure, but otherwise identical. Either way, a case file may be in the possession of an attorney, and out of the possession of agency personnel, for weeks or months at a time.

Rule 1.4 clearly requires that the attorney and the IV-D agency maintain some level of communication. The attorney need not communicate with the agency to the same extent as with a private client. Nevertheless, the attorney must defer to the agency regarding the purposes to be served by the representation, thus allowing the agency to assume the role allotted to the client by Rule 1.2 (Scope of Representation). The agency and the attorney should agree on the extent of communication regarding each specific case and resolve the matter in the cooperative agreement. It must be clearly established what information is to be communicated by the attorney to the agency, at what intervals, and in what form.

Confidentiality

Generally, a lawyer is prohibited from disclosing information relating to the representation of a client except where the client consents after consultation. In addition to stating the general rule, Model Rule 1.6 establishes exceptions if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act which is likely to result in imminent death or serious bodily injury, or where the disclosure is necessary to establish a claim or defense on behalf of the lawyer in a dispute between the attorney and the client.

The second portion of Rule 1.6 is rarely relevant in a child support enforcement case, regardless of the correct identity of the client. Nevertheless, subsection (a) of the rule can apply in at least three situations:

- When it becomes apparent to the child support enforcement attorney that an AFDC recipient, or former AFDC recipient, has committed some form of welfare fraud during the period in which he or she received AFDC
- When an absent parent or his or her attorney seeks to discover the location of the custodial parent, usually in order to visit the children, in response to child support enforcement activity
- When an employee of the child support enforcement agency takes action, or threatens to take action, on a case which will violate the rights of an absent parent.

The fraud situation has produced quite a number of bar ethics opinions as Program attorneys have sought to define the extent of the attorney-client relationship which might exist between themselves and custodial parents or relatives. As noted above, the verdict has been unanimous. The child support enforcement attorney has no duty to protect the AFDC recipient/child support obligee from disclosure to the welfare agency of facts that would call present or past eligibility into question. Bar ethics opinions from Nebraska [Neb.Op. 76-15, 12/10/76], Missouri [Inf.Op. #15, 6/28/79], Oregon [Op. #322, 6/76], and Tennessee [Formal Op. 83-F-55] have all held that such situations present no confidentiality or conflict of interest problems. Moreover, the Missouri and Tennessee opinions hold that the prosecuting attorney not only may disclose the information to the social services agency, but also bring criminal charges against the AFDC recipient for fraud. The Oregon opinion, at p.2, adds the caveat that the attorney should inform the AFDC recipient that he or she "does not represent the AFDC recipient for any purpose, and that the recipient may wish to consult with a private attorney or an attorney from a legal aid society."

Unfortunately, all of the cited opinions concern AFDC cases. Where the family is no longer receiving AFDC, the relationship between the attorney and the custodial relative is more like that of a private attorney and client; the attorney represents the interests of the family, and the interest of the State is less direct. One might conclude that a different confidentiality rule would apply for non-AFDC cases. Two arguments mitigate against such a conclusion. First, the Missouri and Washington cases cited above (Leet and Johnson, respectively, supra) propose that even in the non-AFDC situation, the State's involvement in child support enforcement furthers the public interest at large, and is not principally intended to benefit the custodial relative. Second, the statutory basis of the non-AFDC portion of the IV-D Program [42 USC 654(6)] prescribes that the State provide the same services in non-AFDC cases as in AFDC cases. If the level of service is defined by that provided in AFDC cases, any conclusion that a more extensive relationship exists in non-AFDC cases is hard to justify.

If the conclusions in the above paragraph are valid, then no confidentiality restrictions would arise out of the relationship between the child support enforcement attorney and the custodial parent. Even if the attorney learns of facts that suggest that the non-AFDC applicant committed welfare fraud during an earlier period, there would appear to be no problem with reporting that fact to the welfare agency. Again, the attorney should discuss the absence of the attorney-client relationship with the non-AFDC applicant at the outset of his or her involvement in the case.

The second situation listed at the outset of this discussion is a bit more difficult to resolve. Absent parents and their attorneys frequently seek to discover the whereabouts of the children in response to child support enforcement activity. Again, if we assume that no attorney-client relationship exists, there is no ethical rule which prevents disclosure of this information. However, provisions in State and Federal law limit disclosure of information regarding recipients of support enforcement services. Federal regulation 45 CFR 303.21 provides as follows:

> (a) Under State statute which imposes legal sanctions, the use or disclosure of information concerning applicants or recipients of support enforcement services is limited to purposes directly connected with:
>
> (1) The administration of the plan or program approved under parts A, B, C, or D of title IV or under titles II, X, XIV, XVI, XIX, or XX or the supplemental security income program established under title XVI;
>
> (2) Any investigations, prosecution or criminal or civil proceeding conducted in connection with the administration of any such plan or program; and
>
> (3) The administration of any other Federal or Federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need.
>
> (b) These safeguards shall also prohibit disclosure to any committee or legislative body (Federal, State, or local) of any information that identifies by name or address any such applicant or recipient.

It is important to note that 45 CFR 303.21 establishes a general rule of nondisclosure of any information which identifies a recipient by name or address. For a proper disclosure, one of the exceptions must apply. Subdivision (2) of subsection (a) would seem to apply to the situation posed above. Under this exception, any information which must be disclosed in order to litigate the child support or paternity action would seem to be disclosable. Because this is an exception to a general rule of nondisclosure, it is wise to refer requesting absent parents to the court file, which will often provide the information sought. It is best to refuse to disclose additional information, on the basis of regulation and State statute, unless ordered by the court to release the information.

The third and final situation posed above involves the attorney who learns that an agency employee intends to, or already has, violated law or agency policy in attempting to collect support. If the attorney assumes that an attorney-client relationship exists between the child support enforcement attorney and the child support worker, then a potential confidentiality problem exists. Such an assumption would prove incorrect. Rule 1.13 reminds the attorney that his or her relationship is with the agency as a whole, not with any of its individual employees or officers. The attorney's relationship with the agency should prevent disclosures to outside parties, but there is no ethical prohibition against the attorney disclosing the matter using proper agency channels.

Recipients of child support enforcement services, child support workers and, more importantly, child support administrators should be aware that no attorney-client relationship exists, and that a child support attorney's paramount duty is always to the agency.

Conflicts of Interest

The Model Code deals with conflict of interest problems in three separate rules. Rule 1.7 states, inter alia, that an attorney should not represent a client if representation of that client will be directly adverse to a current client, or if the attorney's existing responsibilities to the current client will affect adversely the representation of the prospective client. The latter requirement limits the attorney from representing a prospective client if the attorney has interfering responsibilities to a third person, or if the attorney has conflicting personal interests.

Rule 1.8 lists prohibited transactions and restates the confidentiality rule discussed above. A subsection of Rule 1.8 prohibits an attorney from accepting compensation from a third party on behalf of a client, unless the client consents after consultation and the third party judgment does not interfere with the attorney's "independence of professional judgment" or the attorney-client relationship.

Rule 1.9 prohibits an attorney who has represented one client from thereafter representing another client in the same or in a substantially related matter in which the second client's interests are materially adverse to the interests of the former client, unless the former client consents after consultation. The rule further states that information relating to representation of the first client cannot be used to that client's disadvantage, except as allowed by Rule 1.6, or where the information has become general knowledge.

These three conflict of interest rules are relevant to child support enforcement attorneys in at least two important contexts. The first is where the attorney has represented one of the parties regarding the support obligation in his or her capacity as private attorney. This can be troublesome for child support enforcement attorneys who were formerly in private practice or who are allowed to maintain a private practice in addition to their child support enforcement responsibilities. The combination of these three rules would seem to disallow the attorney from representing the IV-D agency in a child support case in which he or she was involved as private counsel, except where the former private client consents after consultation. If the former client is the support obligee, he or she may consent. However, the attorney should explain his or her new relationship to the IV-D agency as part of the consultation required by the rules. Where the former private client is the support obligor, the attorney no doubt will have to ask the IV-D agency to refer the case to another attorney. In order to avoid this particular ethical dilemma, child support enforcement attorneys who also have private practices should avoid divorce and paternity cases in their private practices.

The second potential conflict of interest occurs when the child support enforcement attorney conducts his or her relationship with the custodial parent as though a formal attorney-client relationship exists, and the interests of IV-D agency conflict with the interests of the custodial parent. Because the problem arises differently depending on whether or not the custodial parent is receiving AFDC benefits, the following discussion is divided into AFDC and non-AFDC components:

- AFDC cases. To define the potential conflict of interest, it is necessary first to discuss the nature of the relationship between the IV-D agency and the AFDC recipient. A custodial parent who applies for and receives public assistance must assign his or her support rights, including accrued arrearages, to the IV-D agency (or the State). [45 CFR 232.11.] The State becomes vested with legal title to the entire amount of outstanding arrearages. Should a collection be made, the IV-D agency first distributes $50 of current support to the family. Next, it compares the amount of current support ordered by the court (or administrative agency, if applicable) to the AFDC grant amount for the month in which the collection is made. If the amount of the order exceeds the amount of the grant, and the collection exceeds both, the IV-D agency must distribute the difference between the grant amount and the order to the family. The IV-D agency may retain the remainder of the collection up to the total amount of AFDC paid out to the recipient for any prior period. Any amount that exceeds the total amount of AFDC paid out to the family in prior periods must be distributed to the family. [45 CFR 302.51.] Thus, it might be argued that the AFDC recipient retains a limited equitable interest in the arrearage, even after having assigned it to the IV-D agency.

  The difficult ethical dilemma, and possible conflict of interest, occurs when a large arrearage is involved, and the absent parent offers the child support enforcement attorney a settlement that would compromise some of the arrearage.

  The problem is best understood by way of example. Assume that, at the point in time when a family applies for and receives AFDC benefits of $200 per month, an outstanding arrearage exists in the amount of $4400, on a current support obligation that calls for monthly payments of $100. Assume further that it takes 4 months for the case to be referred to the child support enforcement attorney, so that the support owed now has reached $4800.

  During this 4 month period, the family has been paid $800 in AFDC benefits. Applying the above Federal regulations to this set of facts and assuming that $4800 is collected, the collection would be distributed as follows:

  - $50 of the current monthly support collection directly to the family
  - The remainder of the current collection ($50) to offset the current monthly assistance payment
  - $600 to the State
  - $4100 to the family.

The ethical problem arises when the attorney receives an offer of compromise in any amount that is less than the outstanding arrearage. The IV-D agency might be very willing to accept a $2000 settlement to dispose of the case. Whether the State collects $2000 or $4800, it will retain the $650 to which it is entitled under the Federal regulations. If the only true attorney-client relationship is the one that exists between the attorney and the IV-D agency, the attorney has no true conflict of interest and may accept the offer of compromise after communicating it to the IV-D agency and obtaining consent from an individual who possesses authority in such matters.

If the attorney believes that a true attorney-client relationship exists between himself or herself and the AFDC recipient, a conflict of interest arises unless the recipient is informed of the settlement offer and consents. Because all of the arrearages forgiven cost the recipient and not the State, consent may be unlikely. Determining that no such relationship exists and communicating that fact to the AFDC recipient at the outset may resolve the potential conflict.[10] Unfortunately, such a precaution does not make the attorney's negotiations with the absent parent any easier or less uncertain. Clearly, the absent parent should be fully informed of the limited scope of the attorney's representation, and that the settlement may not bind the recipient.

- Non-AFDC cases. Using the same set of facts as above, a potential conflict can be constructed between the duty owed by the attorney to the IV-D agency and that owed to the custodial parent in a non-AFDC case. Assume that all facts are the same except that the family ceases receiving AFDC at the end of 4 months, and, instead of settlement in the amount of $2000, the absent parent offers to pay current support plus the entire arrearage back in increments of $100 per month as part of an income assignment arranged through the absent parent's employer. Assume that the IV-D agency's policy is to accept and promote such arrangements and to keep the arrearage payments until the State's share is paid in full. In this case, the custodial parent would not receive any of the arrearage money for the first 8 months the income assignment is in effect.

  If the custodial parent objects to this arrangement, the conflict of interest arises. The IV-D agency may wish to accept the settlement whereas the custodial parent may want the attorney to pursue other available remedies. Again, the attorney may be able to avoid the conflict by concluding that the only attorney-client relationship exists between himself or herself and the IV-D agency, and so informing the custodial parent. Any other conclusion forces the attorney to sublimate the interests of one client to the interests of the other.

Maintaining Independent Professional Judgment

Rule 2.1 requires an attorney to exercise independent professional judgment and render candid advice to a client. It also encourages the attorney to supplement purely legal advice with reference to relevant nonlegal considerations such as moral, economic, social, and political factors.

The maintenance of truly independent professional judgment can be difficult for the prosecuting or district attorney who has local constituents to please in addition to the child support enforcement responsibilities prescribed by statute or cooperative agreement. This ethical rule reminds us that the interests of the IV-D agency or the families and taxpayers it represents must not suffer because of local political or commercial interests. For instance, local employers may resist compliance with income withholding orders due to the cost and inconvenience involved in deducting support payments from the paychecks of their employees. The influence of such local employers should not affect the prosecuting or district attorney's willingness to use income assignments or to pursue noncomplying employers; in fact, it cannot influence the use of income withholding in those cases where the assignment is mandated by law.

The latter part of the rule reminds the attorney of his or her legitimate role in the formation of policy in the IV-D agency, at least with respect to areas about which the attorney has knowledge. Just as attorneys are encouraged to advise private clients, the child support enforcement attorney should try to influence the "behavior" of the IV-D agency. Arguments in support of this advice need not be limited to legal arguments.

Expediting Litigation

Rule 3.1 requires attorneys to refrain from bringing nonmeritorious claims or asserting frivolous defenses. An exception exists for good faith attempts for "an extension, modification, or reversal of existing law." Rule 3.2 requires an attorney to make reasonable efforts to expedite litigation, consistent with the interests of his or her client.

Given their sizeable caseloads, most child support enforcement attorneys need no reminder to expedite cases and avoid nonmeritorious claims. The rule does highlight at least two collateral issues, however. The substantive law concerning child support obligations is often ripe for "extension, modification, or reversal," and public policy is almost always consistent with any change which makes the enforcement of support obligations more effective. Rule 3.1 provides ethical support for such attempts.

The other point raised by the rule involves intentional delay tactics and recognizes that delay may sometimes be consistent with the interests of one ofthe parties. In child support enforcement, especially with respect to paternity establishment, the obligor's attorney often will attempt to stall the proceedings. This tactic allows his or her client to avoid paying support in the short run. More importantly, however, the obligor has a chance of not being pursued at all if the case gets lost in the shuffle. The child support enforcement attorney has an ethical duty to recognize such tactics, point them out to the court, and skillfully employ local court rules and procedures to move cases through the legal system in a timely fashion.

Impartiality and Decorum of the Tribunal

Rule 3.5 prohibits an attorney from, inter alia, attempting to influence or communicating ex parte with a judge, juror, prospective juror, or other official except as permitted by law. A child support enforcement attorney who deals with the same judge or judges on a constant basis will be tempted to discuss specific cases without providing notice to adverse parties. Such ex parte communications violate Rule 3.5, and should be avoided.

It is just as important to note that discussions with the judiciary regarding the goals and problems of the Child Support Enforcement Program and the efficient processing of cases through the court do not violate this rule.

Special Responsibilities of a Prosecutor

Rule 3.8 applies specifically to a prosecutor in carrying out his or her official duties in *criminal cases*. The focus of child support enforcement has become decidedly civil since the advent of the IV-D Program. Thus, one could argue that the rule does not apply to the prosecutor or other attorney who conducts legal activity on behalf of a State or local support enforcement agency. While this may be technically true, the rule nevertheless recognizes the balance which must be struck between the attorney's duty to his or her client and the duty to act as an evenhanded public official with substantial concern for the rights of adverse parties. The rule requires, *inter alia*, a prosecutor to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel, and has been given reasonable opportunity to obtain counsel." It also prohibits the attorney from attempting to "obtain from an unrepresented accused a waiver of important pretrial rights. . . ."

This issue came up in a different context in a IV-D paternity case brought by the Ventura County, California, District Attorney's Office. In *County of Ventura v. Castro*, 93 Cal.App.3d 462, 156 Cal.Rptr. 66 (Dist.Ct.App. 1979), an appellate court overturned a paternity acknowledgment because the unrepresented alleged father was not fully informed as to the ramifications of his waiver of right to request a jury trial and submit to paternity testing. This case is not cited here as evidence that the Ventura County procedures in effect at the time were lacking or unethical,[11] but simply as evidence that some of the ethical considerations imposed on prosecutors in criminal cases may be relevant in child support enforcement cases.

Truthfulness of Statements to Others

Rule 4.1 states that in the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6.

Unquestionably, subsection (a) of this rule applies with greater force to the attorney who represents a public agency than to a private attorney. No doubt, the scope of the definition of *material* is greater when applied to the government attorney, who has some affirmative duty to disclose information which is legally relevant to a pending legal action. See Chapter 4 for a more complete analysis of the relationship between ethical considerations and the negotiation of child support and paternity disputes.

Communications with Absent Parents Represented by Counsel

Rule 4.2 prohibits an attorney from communicating with a represented party without first obtaining the consent of his or her attorney. This rule poses no difficulty for a child support enforcement attorney except where there is still an attorney of record from an earlier proceeding, such as a divorce. If the earlier proceeding occurred long ago, it can be difficult to determine whether the relationship still exists. The safest approach is to contact the attorney of record to determine whether he or she is still representing the parent. If the attorney denies the current representation, or if no attorney of record can be identified, all conversations with a parent should begin by asking if he or she has retained counsel. If the parent has obtained counsel, further communications regarding the case can be conducted through the attorney.

Communications with Unrepresented Absent Parents

Rule 4.3 requires an attorney to take reasonable steps to ensure that unrepresented persons understand the attorney's role in representing a client. The comment of the ABA Commission notes that unrepresented persons may assume that an attorney is "disinterested in loyalties" or that he or she is a "disinterested authority on the law." If this is a common assumption with respect to private attorneys, it also must be a problem for government attorneys in their dealings with private citizens. While the assumption may be unreasonable or naive regarding the role of a private attorney, it is neither when applied to government attorneys, who are public officials and ministers of justice in addition to the other roles they fulfill.

The child support enforcement attorney should fully explain his or her role to the unrepresented absent parent, and suggest that the person seek to obtain counsel if he or she does not understand the nature of the pending proceedings.

Nonlawyer Assistants

Rule 5.3 requires attorneys who employ or are associated with nonlawyers to make reasonable efforts to ensure that the nonlawyers' conduct is compatible with the professional obligations of the lawyer. This responsibility is applied more strictly where the attorney has direct supervisory authority over the nonlawyer. The lawyer is responsible for conduct of the nonlawyer that would be an ethical violation if engaged in by the lawyer, if:

- The lawyer orders or ratifies the conduct involved
- The lawyer is a partner in a law firm in which the nonlawyer is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

The Child Support Enforcement Program employs thousands of nonlawyers to prepare cases for litigation and to conduct pretrial negotiation and collection attempts. In the collection field, the line between the practice of law and proper collection practices can be, at times, a hard line to draw. It is beyond the scope of this Handbook to define the practice of law. The definition is determined by State law and judicial decisions, and affected by statutory language which clearly anticipates some activity by nonattorney child support enforcement personnel that would otherwise cross the line (e.g., representing the agency in an administrative hearing). The child support enforcement attorney must monitor the activities of the nonattorneys with whom he or she works in light of applicable State legislation, case law, and tradition.

Rule 8.3 states that assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law is professional misconduct. This should not cause the child support enforcement attorney to fear delegations to program staff, and it certainly should not cause an attorney to be reluctant about training nonattorney staff regarding relevant legal knowledge. By carefully reviewing or monitoring all delegated functions and training nonattorney staff, the child support enforcement attorney can avoid ethical problems.

FOOTNOTES

/1/ American Bar Association Commission on Evaluation of Professional Standards, pullout supplement to the November 1982 issue of the American Bar Association Journal.

/2/ See, e.g., the ABA Commission's comment to Model Rule 1.13, supra, p. 16, and J. Fahey, "Special Ethical Considerations of Counsel for Government," 33 Fed.B.J. 331, 335 (1974).

/3/ Or. Op. 322 (6/76); Mo. Inf. Op. 15 (6/28/79); and Tenn. Op. 83-F-55 (8/24/83), respectively. See also O. Maru, Bar Ethics Opinion Digest, American Bar Association, 1981 Supp.

/4/ N.C.S.B. 11-159, Op. 591, 10/26/67.

/5/ 49 N.Y. St. B.J. Op. 463, 1977.

/6/ ABA Supp., Id., p. 5.

/7/ ABA Supp., Id., p.6.

/8/ Transcribed address before the New York City Bar Association (New York: January 28, 1975), pp. 93-113.

/9/ This discussion should not be construed as agreeing or disagreeing with the opinion of the attorney in this hypothetical. Indeed, in many States where the parent's duty of support exists at common law regardless of the existence of a support order, the debt may well be "liquidated," in that its amount may be determined by simple calculation. See Chapter 4, infra, for a discussion of the common law support obligation and Petersen v. Graham, 7 Wash.2d 464, 110 P2d 149, 154 (1941) for a discussion of liquidated claims.

/10/ Note that the timing of the communication to the AFDC recipient is crucial. Ideally, all AFDC recipients should be fully informed of the ramifications of applying for and receiving public assistance when the assignment of support rights is made. The extent of the relationship between the recipient and the child support enforcement attorney ideally would be defined at this point as well. Armed with all this information, the recipient could decide whether or not to forego applying for public assistance and instead turn to a private attorney to collect the existing arrearage. Informing the recipient after the assignment is too late to allow for such an informed choice. In practice, such a timely communication may be impossible or incomprehensible to the recipient. Nevertheless, the attorney can and should undertake to inform the recipient during their initial meeting.

/11/ Indeed, the waiver form in use in Ventura County at the time was thorough and clearly not drafted so as to mislead or misinform defendants.

CHAPTER 4

Pretrial Activities: Interviewing, Negotiation, and Discovery

INTRODUCTION

Attorneys who work for the Child Support Enforcement Program can perform their jobs most efficiently when they share the responsibility for information gathering and case preparation with other Program personnel. The relatively routine nature of information gathering and case preparation allows nonattorney personnel to perform many investigative functions, and even some of the decisionmaking function. The same is often true for the routine negotiation of arrearage settlements and current support amounts. Nevertheless, some evidence gathering involves legal mechanisms that require an attorney. In complicated cases--especially those involving contested paternity--the attorney must interview the custodial relative and other potential witnesses, and negotiate with the absent or alleged parent, or his or her attorney. This chapter discusses these activities within the context of the Program.

INTERVIEWING WITNESSES

The extent to which an attorney becomes involved in the interviewing process in any case depends on the complexity of the case, the structure and policies of the State and local programs, and procedural alternatives afforded by State law. In pure enforcement cases which do not necessarily involve a court hearing (e.g., garnishment in a State that has a summary postjudgment execution procedure), the attorney commonly relies on the information gathered by a child support caseworker. Generally, no communication occurs between the attorney and the custodial relative in such a case. In enforcement cases which require simple court hearings, it is common practice for the attorney and the custodial relative to meet briefly, often immediately preceding the hearing, simply to review the information gathered by the child support worker and to prepare the custodial witness to testify. Again, the attorney delegates most of the interviewing and investigation to the caseworker.[1/]

The attorney is much more likely to do a significant amount of interviewing in cases which require the establishment of paternity and/or the entry of a current support order. Court hearings in such cases are more complicated and the attorney must depend on live testimony to establish the identity of the alleged father and/or the needs of the children. In order to prepare properly for such hearings, the attorney must evaluate the knowledge and verbal skills of potential witnesses. Interviews also provide an opportunity for the attorney to develop rapport with the custodial parent.

The most successful interviews occur when both the interviewer and interviewee are relaxed. Unfortunately, child support interviews take place in an atmosphere that is inherently stressful simply because of the issues which must be addressed. Two factors can help the interviewer be more comfortable with the interviewing process: experience and skill. This section discusses skills and techniques that can make interviews more comfortable and improve the likelihood that they will produce valuable information for the attorney to use in deciding what claims to make or remedies to employ.

Preparing for the Interview

Busy child support enforcement attorneys often view planning for interviews as a time-consuming and unnecessary exercise. This is an unfortunate misconception. A well-planned interview will be more successful and less time consuming than one that has not been planned. Preparation instills greater self-confidence in the attorney-interviewer, leading to less anxiety for both parties and less irrelevant discussion.

The planning process varies with the nature of the case, the extent of investigation that has been conducted by other program personnel, and the interviewee's familiarity with the Program's purposes and policies. There are several basic areas that should be considered when planning any witness interview:

- Reviewing case information
- Identifying interview objectives
- Preparing necessary legal documents
- Setting the stage.

Reviewing case information. The attorney should spend several minutes reviewing the case file prior to interviewing custodial relatives or other witnesses. If the review occurs far enough in advance of the interview, the interviewee can be contacted and asked to bring in any documents missing from the file or relevant to the coming court hearing.

Since interviewing may occur at several different points in the process of establishing or enforcing a child support obligation, the amount of information and documentation contained in the case file will vary from one case to the next. Most child support agencies use a case activity form, or case action log, which provides a chronological listing of all actions, correspondence, and communications pertaining to a particular case. This document is an excellent starting point in the review process. It chronicles the history of the case and often provides some insight into the issues that the absent parent will raise in defense.

The objective of the review is to become familiar enough with the facts of the case to determine who should be interviewed, to formulate interview objectives, and to identify information that should be gathered and legal documents which need to be prepared prior to the interview.

Identifying interview objectives. After the review is complete, the attorney should formulate a list of objectives to use as a guideline for conducting the interview. Clear objectives help identify subject areas which need to be explored and the proper tone for the interview. The optimal tone differs from one interview to the next, depending on the identity of the interviewee and the subject to be explored.

For instance, if the case review indicates that the custodial relative has been less than cooperative, the tone of the interview may be crucial to a successful outcome. The interview properly begins with a supportive and persuasive argument for cooperation. Should that approach prove unsuccessful, a terse statement of potential sanctions, coupled with a reminder that a subpoena is an option, might cause a change in attitude. In any event, the attorney should explain his or her role in the Program and give some background on its procedures and benefits. Such an approach strives to establish rapport and to explain fully the limits of the relationship between the Program attorney and the custodial relative.

In addition to establishing rapport and gathering information, other possible interview objectives include testing the interviewee's credibility as a witness and ability to hold up under an abusive cross-examination; exploring the possibility of fraud; identifying potential defenses; preparing the witness to testify in court, and identifying and locating other potential witnesses.

Preparing necessary legal documents. In many States, the custodial relative verifies the allegations of initial pleadings or prepares supporting affidavits. In interstate cases, the custodial relative must prepare a testimony form and/or an arrearage affidavit. Experience has shown that obtaining these documents from AFDC recipients can be a difficult task. To minimize the problem, the attorney should have pleadings ready for signature during the interview itself, and determine during the interview if additional documents need to be prepared and executed. If that is the case, the attorney, or an assistant, can help the custodial relative and obtain a signature while he or she is in the office.

Setting the stage. Child support and paternity interviews can create a high degree of discomfort for custodial relatives and other witnesses due to the sensitive and personal nature of the subjects which must be discussed. The physical setting of the interview can increase or decrease such anxiety. The attorney should do what he or she can to provide a setting that is conducive to professional attentiveness, quiet ease, and privacy.

Another important variable is the physical proximity between the interviewee and the attorney. In private practice, attorneys typically conduct client interviews from behind a desk. Such a practice is well-suited to a situation in which the attorney is trying to impress a potential client with his or her professional demeanor; it may not be appropriate in the usual IV-D context. First, unless the attorney has a private office with a door, it may be difficult to ensure a sufficient degree of privacy if the attorney and interviewee are separated by a desk. Second, the custodial relative must perceive the attorney as an ally, as opposed to a representative of the "establishment" who is there to do something "to," not "for," the custodial relative and the children. The desk creates a barrier and turns the attorney into an authority figure. This dynamic can be avoided by placing the interviewee at the edge of the desk instead of the opposite side, or by moving the interview to a table and sitting next to the interviewee.

In their two-part article entitled, "The Art of Interviewing and Counseling,"[2/] Mark K. Schoenfeld and Barbara Pearlman Schoenfeld suggest the following additional tips for designing successful interview settings:

- Place the interviewee in view of the door, if possible, to lessen his or her feeling of being trapped.

- Try to avoid making the interviewee wait for the interview to begin, to lessen the opportunity for tension and anxiety to develop.

- Cancel all telephone calls and ask not to be disturbed.

- Try to use an office with soft, natural lighting to minimize the connotation of interrogation.

- Do not discuss matters relevant to the case in the presence of third parties.

Conducting the Interview

Opening the interview. For interviews with a custodial relative, it is particularly important to establish rapport as soon as possible. There are several ways to do this:

- Employ normal "ice-breaking techniques," that is, spend a minute or two making pleasantries.

- Spend some time early in the interview, perhaps as a transition between the pleasantries and the bulk of the interview, asking the interviewee positive questions about his or her background; this increases the interviewee's self-esteem and personalizes the interview.

- Inform the interviewee of the status of the case and the attorney's role in the matter.

- Try to project empathy for the interviewee's situation, within your role as professional legal representative of the IV-D agency.

- Neither expect nor demand the immediate confidence of the interviewee; acknowledge his or her anxiety to discuss intimate details and deal with that anxiety in the open by stressing the laudatory goals you are trying to reach together.

Conducting the interview. One of the dangers of working in a very specialized area of the law is that every case can begin to look alike, so much so that one begins stereotyping cases prior to completion of the fact-gathering process. Such a practice inhibits successful interviewing in at least two respects.

First, it tends to close off potential areas of inquiry. The interviewer fills in factual gaps with assumptions based on his or her experiences with other cases, instead of pursuing information from the interviewee. The interviewer may even miss unanticipated answers. Second, and perhaps worse, the interviewer unwittingly may transfer his or her attitude to the interviewee, producing a self-fulfilling set of facts.

To avoid these problems, the Schoenfelds suggest minimizing the formal structure of the interview, keeping a mental agenda in lieu of a written one and being willing to deviate from the agenda and explore as new information unfolds.[3] A set of prepared questions for use on all cases would run contrary to this approach and make it difficult to follow up on unusual things said and unsaid.

It is a good idea to let the interviewee explain his or her perception of the relevant facts prior to asking specific questions. This technique minimizes the structure of the initial part of the interview, allows the interviewer to give supporting verbal and nonverbal feedback without affecting the subjects chosen by the interviewee, avoids an atmosphere of interrogation, and allows the interviewer to assess the interviewee's value as a witness. If the interviewee is reluctant to talk, initiate the conversation with questions that call for narration. Avoid ones that lead to unclear answers or subject areas.

After the initial narration, check and probe with gentle but direct questioning. Avoid rehashing the story chronologically. Rather, broaden the picture by grouping facts by related topics, both those topics brought up by the interviewee and those that you may have constructed as the interviewee discussed--or failed to discuss--relevant issues. This technique forces the interviewer to be creative and explore uncharted factual areas; it is also very effective for disclosing fabrications. If the interviewee has a difficult time discussing the facts in any order other than the one he or she chose the first time through, the attorney should be wary of the story.

Taking notes. Note taking is a necessary part of the interviewing process, but it can undermine effective communication. An interviewer who takes notes frequently during an interview adversely affects the process in at least two important respects. First, the interviewer must break eye contact with the interviewee. Second, the mere act of noting a fact creates a perception in the interviewee that this fact is comparatively more important than facts not noted. As a result, the interviewee may react by concentrating on areas which he or she perceives to be legally relevant, instead of allowing the attorney to control the interview.

These problems can be minimized by adopting the following techniques:

- As suggested above, allow the interviewee first to relate "the whole story" unimpeded, directing him or her only with questions which call for open-ended, narrative responses. (This has the additional advantage of allowing the attorney to evaluate the interviewee's mental state and value as a witness.)

- Next lead him or her back through the story a second time with structured questions, sequenced according to logic and legal relevance, while taking constant notes, using key words only in the notes in lieu of complete thoughts.

- Maintain as much eye contact as possible.

- After completion of the second run-through, refer to the notes and politely cross-examine the interviewee, testing his or her memory and credibility, and following up on leads.

- Immediately after the interview, convert the notes into a memorandum to the legal file, fleshing out the condensed material and adding impressions.[4/]

Posing questions and responses. The question and answer portion of the interview should maintain and deepen the rapport developed with the interviewee during the early part of the interview, as well as provide additional information. The following techniques are useful:

- Use standard English. Avoid legal or Program jargon and street lingo; the former is confusing and the latter may be perceived as condescending or unprofessional.

- Should the interviewee get off the track, redirect gently; avoid critical remarks which may cause the interviewee to censor the story to conform to what he or she perceives as your agenda.

- Encourage responses with verbal and nonverbal feedback.

- Avoid seeming judgmental; do not inhibit the interviewee's responses by reacting negatively to unusual or aberrant behavior.

- Do not fear silence; give the interviewee an opportunity to think about his or her responses.

- Employ the "funnel approach," that is, move from the general to the specific; this approach promotes free association and triggers the interviewee's memory.

- Clarify and encourage continued discussion by periodically restating, elaborating, or condensing previous statements or impressions made by the interviewee, but take care not to make the interviewee feel inarticulate in the process.

- Be skeptical, especially where the story is unlikely, but transfer your disbelief to the judge, jury, or opposing counsel.

- Approach intimate details with care; be neither profane or prudish.

- Avoid multiple questions and questions which contain double negatives.[5]

Closing the interview. When the attorney senses that he or she has gathered all the information that is to be gained in the interview, he or she should summarize briefly what has been accomplished and what will happen as a result. The summary and explanation provide a smooth transition to departure, facilitate understanding, and increase rapport by demonstrating that the attorney cares about the interviewee's perception of what has transpired and what will occur next. This can be underscored further by asking the interviewee if he or she has any questions. If the interviewee is to execute any legal documents or provide any additional information, the attorney should refer to that fact and provide specific instructions.

If it is office policy to provide copies of all correspondence and legal documents to custodial relatives, make such a pledge during the close of the interview. Encourage the custodial relative to supply additional information pertaining to the case and set out a specific procedures for providing such information. Do not encourage additional direct contacts by reminding the custodial relative how busy attorneys are and how difficult it is to work on any individual case when parents want continual conferences with the attorney.

PREPARING WITNESSES TO TESTIFY

It is important to spend a few minutes instructing all witnesses how to approach giving testimony. Such instruction is particularly important for witnesses in child support cases because they often have had little exposure to the courtroom other than the dramatic portrayals of television and the movies. The following suggestions should be helpful:

- Furnish witnesses with the questions in advance, or go over them orally; this process is for the benefit of the attorney as much as the witness.
- Warn the witness that cross-examiners often ask whether the witness has discussed his or her testimony in advance of taking the stand, hoping to illicit an equivocal response and some guilty-looking body language from the witness. A good response is "of course."
- Advise the witness to refrain from volunteering information not asked for by the questioner, and just answer the question.
- Advise the witness to admit not knowing the answer to any question. This is particularly important in paternity cases regarding the exact date of conception or the last menstrual period prior to conception. An answer that is too exact may seem fabricated and give opposing counsel ammunition to destroy plaintiff's version of the facts.
- Give the same advice regarding the witness's memory, but add the warning that a selective memory (forgetting only facts that may be harmful) can destroy a witness' credibility.
- Advise the witness to speak loudly with good projection, especially in jury trials; a good way to check on volume and projection is to begin examining the witness from the point most directly in front of the most distant juror.
- Advise the witness to refrain from responding to hostile cross-examination with sarcasm; the judge or jury will respond more favorably to a soft answer that contrasts with the hostility of the question.
- Advise the witness to avoid the temptation of responding to a question with a question; it only produces an embarrasing instruction from the judge.
- Encourage the witness to think out his or her answers before responding; a brief pause helps compose the witness and gives the attorney an opportunity to make an objection.
- Give the witness a crash course on the hearsay rule, and warn him or her to refrain from discussing what someone, other than a party to the suit, said.
- Advise the witness to refrain from couching his or her testimony in the form of opinion, unless the question clearly calls for it.
- Spend a great deal of time instructing the witness about dress and demeanor; conservative dress, hairstyle, and adornment are essential, especially in paternity jury trials.
- Ask the witness to turn slightly toward the judge or jury when answering questions in order to make some eye contact and develop rapport.

- Advise the witness to avoid attempts at humor; the only type of humor that works in a court room is the unintended variety.
- Advise the witness to refrain from losing his or her temper in the face of antagonistic cross-examination; other emotion, such as sobbing or crying by female witnesses, is probably not harmful as long as it appears genuine.
- Advise the witness to stop talking when an objection is made.[6]

NEGOTIATION

The first section of this chapter dealt with interviewing favorable witnesses. This section turns to contacts with the absent parent, or his or her attorney. Most contacts of this type are aimed at reaching a negotiated settlement or consent agreement. Negotiated settlements are preferable to judicial resolutions, especially in areas of the law such as child support enforcement where the expenses of litigation for any individual case are significantly greater than any expected monetary recovery. From the IV-D agency's perspective, virtually every case litigated in the traditional court system is probably not cost-effective. Litigating child support cases cost the agency, and society in general, to the extent that court time and personnel are involved. The time and effort spent preparing for court and attending a hearing are time and effort which could be spent on more cost-effective activities.

Perhaps more important than the short-term cost is the long-term effect of judicial resolutions. Common sense suggests that absent parents more often comply voluntarily with consent orders than with orders imposed after contested judicial hearings. Negotiated settlements are clearly more conducive to maintaining a peaceful relationship between parents, which is important to the continued growth and development of the child.

Preparing to Negotiate

Contacts with absent parents that involve negotiation are in many ways similar to the interviews discussed above. Because gathering information is an ancillary goal of each negotiation session, and because many of the interpersonal dynamics are similar to those discussed above, it pays to prepare for a negotiation session as you might prepare for a more routine interview.

Review case information. To design a workable settlement--one which both parties prefer to litigation--it is necessary to have information. A negotiator needs information about the needs and objectives of the IV-D agency, the custodial relative, and the absent parent. Indeed, one of the main strategies of negotiation theory concerns the willingness with which the negotiator divulges information about himself or herself, or about the client he or she represents. The case file thus becomes a valuable asset to the skilled negotiator, one which should be consulted well in advance of a negotiation session.

Clearly, financial and employment information about the absent parent is relevant to the amount of support he or she should be required to pay. A well-developed case file often will contain more than this. For instance, the narrative section of the file may document the concerns the absent parent has expressed during previous contacts with the agency. Such concerns occasionally can become concessions in the negotiation process. The narrative section also can be a good source of information regarding the absent parent's present living arrangements, which may indicate an aversion to publicity that can strengthen the agency's bargaining position.

The same is true of file information regarding the custodial relative and the children. The case file should reflect any special needs which might be met by tailoring the support obligation. The ages of the children are clearly of some relevance in designing the terms of the order.

If an action has already been filed and the matter assigned to a specific judge, that information is clearly relevant to the range of acceptable settlements. Judges establish patterns over time, and an attorney should take these into account prior to accepting or rejecting any proposed settlement.

Identify objectives. A negotiator should enter a negotiation session with a number of objectives. Frequently, within the context of the Child Support Enforcement Program, they will including the following:

- Obtain adequate current support.
- Establish paternity/obtain blood test stipulation.
- Close the AFDC case.
- Obtain additional information to be used during enforcement.
- Obtain income assignment, effective immediately.
- Establish and maintain a working relationship with the absent parent.
- Avoid using valuable court time.

Generally, the client sets these negotiation objectives; at this point the IV-D attorney should limit his or her role to providing advice and counsel. It is tempting to appropriate decisionmaking authority and set the negotiation limits. Avoid this temptation; treat the agency like a private client and allow authorized individuals to set the ground rules. Thus, prior to conducting any negotiations on behalf of the IV-D agency, the attorney may want to meet with authorized representatives of the agency to set general negotiation strategies and establish the limits of the attorney's authority.

Prepare necessary legal documents. Many child support enforcement legal units have standardized legal documents for all negotiation sessions. Standard forms allow the attorney to reach an agreement with the absent parent and prepare documentation all in one motion. Even where a consent agreement cannot be reached, the attorney may be able to obtain a waiver of service of process from the absent parent, who generally wants to avoid a visit from the sheriff.

NEGOTIATION STRATEGIES

Negotiation is "a process in which parties with differing interests seek a mutually agreeable set of terms that each would prefer to nonsettlement."[1] Traditionally, the process has been an adversarial or competitive one with each side trying to mislead the other about his or her true settlement range, while discovering the true range of the adversary. The traditional strategy produces a number of nonproductive behaviors and, therefore, may not be appropriate to child support enforcement negotiation. Many writers now are identifying an alternative to the traditional strategy, variously referred to as problemsolving, collaborative, principled, or win/win negotiating. These approaches are discussed below, both in theory and in the child support context.

Traditional Strategy

The traditional negotiation model is labeled "positional" or "competitive." It involves submitting an initial position well in excess of the negotiator's point of minimum resistance; strictly adhering to this position; restricting the flow of information about the negotiator's fact situation; attempting to obtain the opposition's facts without giving up much in exchange; and discounting the importance of the continuing relationship between the negotiators in exchange for short-term gains.

Selecting an initial position. In the normal legal negotiation, the choice of an initial position is of utmost importance. It is an attorney's first opportunity to convey his or her client's position to the opposing counsel, and, if conveyed in the form of a pleading, it may limit the amount of the ultimate recovery. The initial position also says much about the client's commitment to litigate the matter should negotiation fail, his or her willingness to negotiate and the range in which such negotiation is likely to occur, and the attorney's experience or naivete in estimating the value of a claim.

In the child support enforcement context, Federal regulation often dictates the initial position. For instance, in a paternity case, there is little negotiating headroom on the issue of paternity establishment; since there is no court order, the amount of current support to be sought is calculated with a formula for determining support obligations as required by 45 CFR 302.53. Nevertheless, there may be some decisions to be made as to the amount of any claim allowed by State law for reimbursement for support paid by the custodial relative or the welfare agency in the past. Agency policy may dictate the choice here as well.

Adhering to the initial position. A fundamental precept of the traditional negotiation model is to avoid making concessions, especially the initial concession. By adhering to an initial position, which is at or near the opponent's minimum settlement position (the point at which the opponent would prefer litigation to settlement), the negotiator theoretically gains several advantages. First, the opponent gains respect for the client's position and the negotiator's toughness, and is therefore more likely to make significant concessions. Second, the delay improves the negotiator's opportunity to gain information with which to gauge the opponent's commitment to his or her opening position and willingness to litigate. Third, by adhering to the initial position, the negotiator increases the favorableness of any "split-the-difference" resolution.

Traditional negotiators employ several techniques to justify strict adherence to their initial position while keeping the door to negotiation open. One technique is "commitment" and consists simply of statements intended to convince the opponent of the sincerity with which the negotiator intends to adhere to the initial position. The commitment can be communicated in the form of a pledge of resources, a reference to a moral principle, or an interest in maintaining a reputation.[8] In the child support context, most opponents probably assume a pledge of resources. Once the IV-D legal unit has begun to process a case, it usually is understood that the matter will go to trial after an unsuccessful negotiation. References to moral principles often involve allusion to the mission of the Program, the directives contained in the Federal regulations and State statutes, and societal mores concerning the child support obligation. The reputation issue can be injected by letting the opponent know that the negotiator is keenly aware of the importance of maintaining a tough legal reputation regarding the enforcement of child support obligations and the effect of the immediate case on that reputation.

Another such tactic, "rationalization," includes any argument intended to convince the opponent that the negotiator's position is based on principles which both parties share and which are rooted in predominate social values.[9] This is a common tactic in child support negotiations, given the strong moral nature of the obligation. Another example is the use of objective support guidelines, as urged by the Child Support Enforcement Amendments of 1984 (guidelines must be established by October 1, 1987), to back an initial position regarding how much an absent parent should be required to pay.

Still another adherence technique is the "threat." "Threats are used to change the opponent's expectations of reactions his choices will elicit."[10] The basic motive here is to convince the opponent that the costs of failed negotiation are greater than he or she initially estimated. In the child support context, a "threat" could be a reminder that failure to reach an agreement on arrearage repayment could result in a contempt hearing before a particularly tough judge. Another example would be the statement, if true, that all contested paternity cases which go to trial include a reimbursement claim, in addition to the paternity and current support claims, and that the court has a history of granting such claims. In a few States, such a claim can apply in an action to establish a support obligation as well as in the paternity situation.[11] Threats to file a criminal nonsupport action should the negotiation fail are clearly unethical.

Controlling and limiting the flow of information. In his article entitled "A General Theory of Negotiation Process, Strategy, and Behavior," Professor Gary Lowenthal notes that the chief problem with adhering to a position at or near the opponent's minimum point of settlement is that, typically, the negotiator enters the negotiation process without any knowledge of what that point is. As a result, one of the traditional negotiator's most important objectives is to control the flow of information to and from the opponent in order to discover that point without revealing his or her own.[12] This objective and the techniques discussed above (commitments, rationalizations, and threats) combine to limit the exchange of true information.

Information exchange can be restricted in several ways, all of which involve some form of concealment or deception. One of the most common forms of this behavior involves false commitments by the traditional negotiator, which then are bargained away in exchange for information regarding the opponent's minimum point of settlement, or some other form of concession. In the child support context, the false concession could be the reimbursement claim. In exchange for some good financial information, such as the absent parent's tax returns from the previous three years, the IV-D agency could release its claim for reimbursement of amounts expended in public assistance prior to the establishment of the current support obligation. Prior to the release, the agency negotiator would be acting as though the reimbursement claim is of paramount concern.

Another technique popular with traditional negotiators is to feign limited authority to speak, or make concessions, on behalf of the client. This can be achieved by painting the client as a very committed individual or organization, by overstating the difficulty the negotiator will face in communicating any settlement offers, and by stating that another attorney reviews all settlement offers prior to their submission to the client. All of these techniques have the goal of causing the opponent to divulge information, perhaps in the form of a settlement offer, without the need for a concession or binding agreement in exchange. In the IV-D context, the negotiator could state that all offers of settlement must be approved by the District Attorney, or some high official in the IV-D agency, who is described as a very tough negotiator. The same reputation could be drawn for the judge who would have to review any order which is entered or arrearage settlement which is proposed.

Minimizing the importance of a continuing relationship. The traditional negotiator typically maintains an adversarial attitude and acts as though the relationship between the negotiators, or the parties they represent, is irrelevant to the manner in which the negotiation is carried out. Such behavior may be used to convince the opponent that the negotiator is tough and committed to the initial position, or to take advantage of an opponent's perceived desire to walk away from the negotiation table with the relationship intact. In the child support enforcement context, such behavior sometimes is used to impress upon the absent parent that his or her excuses for nonpayment, or reasons for nonliability, are so invalid that they are not even worthy of serious discussion.

Collaborative Strategy

In recent years many writers have identified a workable alternative to the traditional negotiation strategy. The most popular and comprehensive treatment of the new negotiation strategy, which is referred to as collaborative negotiating in this Handbook, is Fisher and Ury's bestseller, Getting to Yes.[13] Fisher and Ury note that the traditional negotiation strategy is inefficient, produces unwise agreements, and endangers the ongoing relationship of the negotiators, because both the initial positions and subsequent settlements are often wholly unrelated to the true interests of the respective parties.[14] To avoid these disadvantages, Fisher and Ury have identified several techniques, which are briefly discussed below.

Focus on interest, not positions. Collaborative negotiation strategy avoids stating "positions." The parties' underlying interests define the problem, and to state a position which is near to the opposition's minimum settlement point, as the traditional strategist would propose, merely masks these true interests while ignoring those issues over which the two parties share some ground. To avoid the pitfalls of positional negotiation, collaborative negotiators begin by discussing the areas of common ground, and then turn to defining both parties' underlying interests. An important objective objective of the process is to define each interest from the perspective of the interested party and then to state the interest in the most specific terms possible from the perspective of that party. In order to achieve this objective, all parties must recognize the legitimacy of opposing interests. Once this process is complete, the issues for negotiation should be stated in complete and specific terms.

Invent options for mutual gain. Assuming the above process has been completed successfully, the task which remains is to construct a resolution which addresses all legitimate concerns of the parties. In the collaborative approach, both sides in the dispute look for creative solutions to achieve a complete resolution. Thus, both parties must accept that the problems of either side are actually the problems of both sides in the negotiation process, and that there are no barriers (other than artificial ones constructed by the parties themselves) which prevent the expansion of the negotiation agenda to allow

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for creative solutions that at first may appear unrelated to the issue at hand. This creative process separates "inventing from deciding."[15] Parties should brainstorm proposed solutions without committing to them as settlement proposals. For this creative exercise to occur, both sides must be committed to a free and open exchange of truthful information. The emotional arguments that traditional negotiators employ to justify their initial positions are replaced in the collaborative approach by rational, true statements that identify problems and interests and explain proposed solutions.

Insist on using objective criteria. To avoid taking positions and developing the often concomitant ego attachment, collaborative negotiators base proposed resolutions on objective criteria whenever possible. Fisher and Ury identify three basic points to remember in discussing the use of objective criteria with the other side:

- Frame each issue as a joint search for objective criteria.
- Reason, and be open to reason, as to which standards are most appropriate and how they should be applied.
- Never yield to pressure, only to principle.[16]

To avoid the necessity of taking a position, both parties first should agree on jointly held principles and then choose appropriate objective criteria or standards. In the child support context, the absent parent generally will agree that parents should support their children, and that parents in similar financial situations should be called upon to contribute a similar amount, all other things being the same. A paternity situation might begin with the alleged father agreeing that children born out of wedlock deserve support from their parents as much as children born of a marriage, and that authorities should seek all available evidence to determine whether the respondent in a paternity suit is actually the father of the child in question.

Once the general principle is agreed on, an objective manifestation of the principle must be chosen. Where both parties to the negotiation are familiar with such an objective standard, it is not difficult to make the choice. Where one side is considerably more comfortable with a published standard than the other, the party who proposes the standard must demonstrate that the standard represents the principle that has already been agreed on. In negotiating a child support obligation amount, reference to any support guidelines or formulas within the jurisdiction could easily dispose of this issue. Although they need not be binding, all States must have guidelines for determining support amounts in effect by October 1, 1987. This should ease the negotiations process even further. However, if no such standard exists at this time, the IV-D attorney could use his or her access to court records and experience with the judges in the jurisdiction to compile a guideline. For paternity cases, the office must have material available to educate both opposing counsel and unrepresented parties regarding the usefulness and objectivity of genetic testing.

Objective criteria are fair in the great majority of cases, but there may be situations in which support guidelines and genetic test results are inconclusive or even unjust. Fisher and Ury suggest that the collaborative negotiator remain open to adjustments that are consistent with the underlying principle. To do otherwise turns the criteria into ammunition for an argument in support of a position arrived at objectively. Such a technique clearly opposes the basic rule of collaborative negotiation, which is to avoid taking positions.

The last of the three points listed above cautions the collaborative negotiator never to yield to pressure. To apply this rule, always ask an opposing negotiator to explain a proposed settlement in terms of theory, and let the opposition know that only principled solution are open to discussion. In the child support context, the opposition rarely will have enough leverage to apply any real pressure. Nevertheless, the attorney should remember that this rule is reciprocal. The collaborative negotiator does not apply pressure in order to force a settlement, unless and until it becomes apparent that a problemsolving approach simply is not going to work.

Separate the people from the problem. Traditional negotiation strategy downplays the importance of the long-term relationship of the parties and the negotiators themselves. Collaborative negotiation develops a positive relationship as a goal of the negotiation itself. Negotiators are people first with basic needs and wants. This is relevant to every negotiation situation, and the collaborative negotiator takes advantage of the phenomenon instead of being blocked by it.

Fisher and Ury list several techniques for maintaining a positive relationship despite difficult disputes.

- Put yourself in the opponent's shoes.
- Do not put the worst interpretation on everything the opponent says.
- Do not blame the opponent for your problems.
- Discuss each other's perceptions.
- Look for opportunities to act inconsistently with the opponent's perceptions.
- Give the opponent a stake in the outcome by making sure he or she participates in developing the resolution.
- Make sure the resolution allows the opponent to "save face;" that is, make all proposals in terms that are consistent with the opponent's legitimate values.
- Make emotions explicit and acknowledge them as legitimate.
- Allow the opponent to vent frustration.
- Listen actively and acknowledge what the opponent says.
- Speak about yourself, not about the opponent.
- Discuss the future, not the past.[17]

In the child support context, building a positive relationship with the absent parent is of absolute importance. From the State's perspective, it is important that the absent parent exit the negotiation process with the feeling that justice has been served and that the established obligation is a fair one. Any other result gives the absent parent a rationalization for noncompliance and greatly diminishes the likelihood of voluntary payment. From the children's point of view, any result which interferes with the relationship between the parents may damage a child's emotional growth and development, not to mention economic security.

Choosing a Negotiation Strategy

Professor Lowenthal has identified several factors which affect the choice of a strategy in any given negotiation situation, including the payoff structure, the size of the agenda, the expectations and sophistication of the opponent, ethical considerations, legal constraints, and the importance of continuing a friendly relationship.[18] As the discussion below points out, these factors affect each case differently, such that while a collaborative approach is generally more appropriate for child support negotiators, some cases require the traditional approach.

The payoff structure. The nature of the underlying dispute is relevant to the choice of negotiation strategy in at least two respects. The most relevant concern is whether the two parties must share or barter the item being negotiated, or whether there exists a resolution which allows each party to increase his or her share of the outcome.

A zero-sum negotiation is one in which there is one item or sum which must be rationed, such that one party's gain is offset by a corresponding loss suffered by the other party (+X + -X = 0). All other things being equal, the traditional negotiation strategy generally works best in zero-sum situations; the range of solutions is so limited that the objectives of the two sides are, by definition, antagonistic.[19] Conversely, where two parties both bring something of value to the negotiation table, and where both are willing to contribute that thing of value in a cooperative effort, the collaborative negotiation strategy is more appropriate.[20] A good example of the latter negotiation is a partnership agreement in which, presumably, both parties benefit.

Lowenthal points out that many situations appear to be purely zero-sum while possessing a sufficient number of non-zero-sum characteristics to make a collaborative approach appropriate.[21] One good example of such a situation is a child support arrearage dispute. Clearly, any amount collected by one party will produce a counteracting loss by the other. Nevertheless, the collaborative approach may be appropriate when a significant amount of arrearage clearly exists whichever negotiator's side of the law or the facts is accepted and where it is possible to expand the agenda to address additional interests of the absent parent. For instance, assume the absent parent is admitting to a $1000 arrearage and the IV-D agency records indicate that the amount owed is $1750. Both parties might prefer litigating the dispute over splitting the difference. A collaborative negotiator might seek to determine if any alternative interests could be served along with the settlement as to amount. For instance, the IV-D agency might be very willing to settle for a $1200 settlement in exchange for an immediate wage assignment, which will guarantee future compliance. Knowing that automatic wage withholding is mandatory under Federal regulation [45 CFR 303.100], the absent parent might be willing to settle on an arrearage figure of $1500 dollars in exchange for a gradual pay-back arrangement.

The size of the negotiation agenda. As the above discussion indicates, the greater number of items on the negotiation agenda, the greater the opportunity for collaborative negotiation, even though each of the individual items would produce a zero-sum condition were they negotiated separately.[22] Even with a traditional approach, it can be advantageous to expand the number of items to be negotiated because such expansion allows a stronger initial position. The traditional negotiator will attempt to expand the number of items within his or her initial position, whereas the collaborative negotiator will search for additional interests, from the perspective of both sides, in order to expand the negotiation agenda and stimulate the creativity of both negotiators.

The child support and paternity contexts provide few ways to expand the agenda. Most available techniques involve increasing the number of claims against the absent parent in addition to the child support or arrearage claim. For instance, the following additional claims can be added to a support claim in many States:

- Interest
- Attorney's fees
- Court costs
- Reimbursement of AFDC payments made to the family during periods in which no court order was in effect
- Lien, performance bond, or other guarantees
- Medical support
- Wage withholding, which is mandatory and effective immediately when the support order is entered
- Blood testing and expert witness fees.

Clearly, this agenda expansion is more appropriate to the traditional approach and involves some danger of frightening the absent parent or alleged father out of any willingness to negotiate.[23] If such problems can be avoided, the addition of ancillary claims allows the IV-D agency plenty of room to give ground and the opportunity to take a collaborative approach. In addition, it is possible to expand the agenda in a few respects to meet absent parents' objectives. Some jurisdictions may want to put up the money for blood tests to assure an alleged father that he is actually the biological father. Others may be willing to contact a uncooperative employer in order to help the absent parent implement a wage assignment. Still others may go so far as to mediate a visitation dispute. Any step that secures a negotiated settlement, and is comparatively more cost-effective to the IV-D agency than a contested court hearing, is a possible agenda item and should be considered and discussed.

The expectations and sophistication of the opponent. Attorneys' willingness to negotiate varies from jurisdiction to jurisdiction for a number of reasons. In jurisdictions where there is difficulty obtaining court time, where the judiciary is very settlement oriented, or where seeking settlement through mediation is a required prerequisite to suit, settlement may be the paramount goal in representing a client. Where attorneys are comfortable with negotiation as a norm, it is more likely that a collaborative approach would be effective. In such a jurisdiction, it is less likely that an opposing counsel would perceive an offer of collaboration as a sign of weakness.

Conversely, it is unwise to use a collaborative approach to negotiate with an opposing counsel who has a reputation for being an unshakable traditional negotiator. As a rule, the child support enforcement attorney has a considerable degree of leverage based on the resources from which he or she has to draw, and the strong public policy behind the cause. While collaborative negotiation may be a better approach in general, individual opponent's behavior may demand an adversarial approach.[24]

Similarly, some situations may call for the collaborative approach. Every attorney has an ethical responsibility to treat unrepresented opponents differently from those who have counsel. This responsibility is more pronounced when the attorney represents the government against a private citizen. The traditional negotiator may use factual misrepresentations to justify and maintain a position, and the fairness of settlement terms is of very little concern, as long as the negotiator's client is satisfied. Where the government is one of the parties, such tactics are indefensible. The IV-D attorney who deals with unrepresented absent parents and alleged fathers on a regular basis may want to choose a collaborative approach.

Ethical considerations. Many of the ethical considerations discussed in Chapter 3 affect the attorney's choice of a negotiation strategy. The IV-D attorney's need to communicate settlement offers to his or her client, combined with the difficulty he or she may have in communicating them, may make the traditional approach easier to implement. Similarly, the IV-D attorney's responsibility to refrain from divulging information relating to the representation of a custodial parent, made more stringent by 45 CFR 303.21, may limit the attorney's ability to share information with the absent parent's counsel. As noted above, since information sharing is important in the collaborative approach, that approach may be difficult to use in some cases.

Other ethical considerations make the collaborative approach more appropriate for negotiating child support and paternity disputes. The special responsibilities of a prosecutor and the Government attorney's extra responsibility to refrain from making even slight intentional misstatements of fact both suggest a collaborative approach. This approach may be more appropriate due to the large number of unrepresented absent parents IV-D attorneys must negotiate with and the extensive explanation these negotiations require.

Statutes and regulations. The Social Security Act requires each State to have in effect a plan to establish paternity and to establish and enforce support obligations for both groups of the recipient population. The statutory responsibilities have clear implications for negotiating child support and paternity awards, and do affect the choice of style. In requiring paternity to be "established," the Act would seem to rule out any settlement which would allow the court to enter a support order without making a determination of paternity, a compromise allowed in some civil paternity statutes. More specifically, 45 CFR 302.53 and 302.56, which require each State to develop a formula to use in determining how much an absent parent should pay, clearly prohibit the entering of an abnormally low support amount merely to dispose of a case.

Likewise, local statutes or rules can affect the process. Some judges actively promote litigants to attempt settlement before requesting court time. A number of jurisdictions have given some structure to the process by appointing masters or referees to promote settlement. The Uniform Parentage Act normalizes this practice by requiring the parties in a paternity action to attend a preliminary hearing, present their sides of the case, and allow the court to make a recommendation at the pretrial stage. At a minimum, most courts review all child support and paternity settlements to prevent the entry of unreasonable consent judgments. Clearly, the practice in a jurisdiction will affect the IV-D attorney's choice of negotiation strategy.

Continuing relationships. Perhaps the most important factor in determining a negotiation strategy is the importance of maintaining an ongoing relationship with the

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opponent. This issue is of particular importance in the child support context for several reasons. First, even with the advent of effective and automatic enforcement mechanisms, the Program still depends on voluntary compliance for the majority of its collections. Bad relationships lead to noncompliance. Noncompliance is not cost-effective, regardless of the terms of the order originally negotiated. Furthermore, the outcome of the support enforcement process can have an impact on the relationship between the absent parent and the children. Both of these considerations point in the direction of collaborative negotiation strategies.

Negotiating child support and paternity disputes is a very difficult process. Because the pay-off structure is limited and the agenda hard to expand, a traditional negotiation strategy might appear the only option. Ethical considerations cut both ways, making it even more difficult to expand the areas for potential agreement. The court system, the Federal requirements, the sophistication of the opponents, and the need for a good relationship after the fact all point in favor of the collaborative strategy.

DISCOVERY

As noted above, nonattorneys conduct virtually all prelitigation investigating in IV-D cases. However, after an action is filed, more formal discovery devices must be employed by the attorney assigned to the case. This section reviews the general discovery process conducted in most States. Chapter 10 provides additional treatment of discovery in paternity cases.

Scope of Discovery

Federal Rule of Civil Procedure 26, after which a majority of State discovery rules are patterned, defines the permissible scope of discovery. In general, parties may obtain, through use of one of the discovery devices discussed below, any matter not privileged that is relevant to the subject matter of a pending action. The objective of discovery may relate to the claim or defense of any party, "including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."[25] According to the Rule, discovery should be allowed even when the information sought may be inadmissible at trial as long as the information sought is reasonably calculated to lead to the discovery of admissible evidence.

Insurance

Subdivisions (2) through (4) of subsection (b) of the Rule discuss three specific applications of the general Rule, all of which have potential application to child support cases. Subdivision (2) takes up the issue of the discoverability of insurance agreements. The rule provides for liberal discovery of the existence of insurance which may indemnify or reimburse a party for satisfaction of any judgment entered, but does not affect the general rule that the existence of such insurance is inadmissible in evidence. This matter is clearly of interest to child support attorneys since health insurance may provide coverage for the children and carry out the IV-D agency's medical support enforcement responsibilities pursuant to 42 USC 652(f) and 1302 and 45 CFR 306.

Trial Preparation Materials

Federal Rule 26(b)(3) limits the ability of any party to obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial. The Rule codifies and clarifies the U.S. Supreme Court's famous decision in *Hickman v. Taylor*, 329 US 495, 67 SCt 385, 91 LEd 451 (1947), which established a limitation on discovery of an attorney's "work product." Under both *Hickman* and the new Federal Rule, all written materials obtained or prepared by an attorney with an eye toward litigation are free from discovery, except where the other party can justify discovery with a substantial showing that the material is essential to the preparation of his or her case and that an alternative source does not exist. Oral statements made to the attorney or notations of the attorney's impressions and opinions are strictly protected.[26] A written statement, or a transcript thereof, made by the party who is seeking to obtain discovery and in the possession of another party is not immune from discovery.

The new Federal Rule extends the qualified immunity on an attorney's work product to cover written materials obtained in anticipation of litigation by representatives of a party who are not attorneys. Thus, it can be argued that all materials contained in IV-D case files, whether obtained prior to or after referral to a IV-D attorney, are generally immune from discovery, except for statements made by the party who is seeking the discovery. In addition to the generic discovery limitations, 45 CFR 303.21 requires all States to safeguard information gathered which pertains to applicants for or recipients of support enforcement services, with some stated exceptions.[27] One of the exceptions allows for disclosure of information for purposes directly connected to administration of the IV-D Program, or other selected programs established by the Social Security Act. Frequently, opposing counsel respond to support enforcement attempts with custody challenges, and seek discovery of information contained in IV-D case files to establish a basis for a custody modification. Judges in some States may permit discovery of this information on the theory that it was gathered for purposes directly related to the administration of the child support enforcement program and therefore is not protected. A State counterpart of Federal Rule 26 would seem to protect against such discovery, and the Federal regulations appear to require the IV-D agency to attempt to prevent disclosure, despite the counterargument.

Trial Experts

Expert witnesses commonly are used in two situations in child support enforcement. The most common is the genetic testing expert employed in contested paternity cases. The other common expert is the economist whom a few States may employ to determine child support levels. There are limits on discovery of facts known and opinions held by experts which are acquired or developed in anticipation of trial, relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence. In most States, a party may serve any other party with interrogatories requiring the latter to identify each person who will be called as an expert witness, to state the subject matter and the substance of the facts and opinions on which the expert is expected to testify, and to provide a summary of the grounds for each opinion. If the expert was retained in anticipation for litigation but is not expected to be called as a witness, the expert's knowledge or opinions is discoverable only upon a showing of exceptional circumstances.

The Fifth Amendment

A major limitation to effective discovery devices in child support and paternity litigation is the Fifth Amendment's protection from self-incrimination. The most helpful information to be obtained through discovery concerns the absent parent's financial condition. Because this information could well subject the absent parent to conviction for criminal nonsupport, the Fifth Amendment may prevent compelled discovery. [Tennessee Dept. of Human Services v. Vaugh, 595 SW2d 62 (Tenn. 1980).] Many States will grant immunity to avoid the self-incrimination problem, but the procedure can be so cumbersome as to defeat the purpose of liberal discovery, which is to make the gathering of information an effective and inexpensive aid for trial preparation.

Discovery Devices

The normal array of discovery mechanisms afforded a litigant by State law includes the following:

- Depositions upon oral examination
- Depositions upon written questions
- Written interrogatories
- Production of documents or things
- Permission to enter upon land or other property, for inspection and for other purposes
- Physical and mental examinations
- Requests for admission.

Discovery in child support enforcement litigation is most important in contested paternity cases. Chapter 10 deals with each of the above discovery mechanisms, both in general and as applied to paternity litigation.

Both interrogatories and requests for admissions may be served on the adverse party at any time after service of process, and both are very effective methods of narrowing contested issues at trial and obtaining evidence regarding an absent parent's financial situation. Most absent parents are willing to complete a financial statement voluntarily, and this step in the information gathering process often will have been completed before the case is referred for legal action. Nevertheless, it is advisable to have a set of interrogatories available for use in cases where a support order needs to be established, or for use in civil contempt proceedings. Exhibit 4.1 in the appendix to this chapter provides a model for interrogatories.

Duty to Supplement

Federal Rule 26(e) requires parties to supplement responses, even though they may have been complete when made, in the following instances:

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- The response dealt with persons who have knowledge related to discoverable subject matter or who are to be called as witnesses at trial, or additional persons or witnesses have been identified.

- The response is no longer true, or new information causes the party no longer to believe the response to have been true when made.

If a party fails to comply with the duty to supplement, the court may refuse to allow an unnamed witness to testify, grant a continuance or new trial, or grant other relief which it deems just.[28]

FOOTNOTES

/1/ Portions of this section on interviewing are based on Laurene T. McKillop, Ph.D., et al., Interviewing Techniques for Child Support Workers (Rockville, MD: National Institute for Child Support Enforcement, 1981).

/2/ 24-1 Prac. Law 67,70; 24-2 Prac.Law 41 (1978).

/3/ 24-1 Prac.Law 72.

/4/ 24-1 Prac.Law 70-71.

/5/ 24-2 Prac.Law 41-48.

/6/ B. Spivey, Manual for the Trial of Contested Paternity Cases (Austin, TX: Texas Dept. of Human Services, 1977); OCSE-IM-78-32, p. 12.

/7/ G. Lowenthal, "A General Theory of Negotiation Process, Strategy, and Behavior," 31 Kan.L.Rev. 69 (1982).

/8/ N. Coleman, "Teaching the Theory and Practice of Bargaining to Lawyers and Students," 30 J.Leg.Educ. 470, 476 (1980).

/9/ Id., p. 475.

/10/ Id., p. 476.

/11/ See Chapter 5, infra.

/12/ Lowenthal, supra, pp. 79-80.

/13/ Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In (New York, NY: Penguin Books, 1981).

/14/ Id., pp. 3-10.

/15/ Id., pp. 62-67.

/16/ Id., p. 91.

/17/ Id., pp. 18-40.

/18/ Lowenthal, supra, pp. 92-109.

/19/ Id., p. 95.

/20/ Id.

/21/ Id., p. 96.

/22/ Id., p. 97.

/23/ Some writers have concluded that negotiation becomes more competitive and difficult as the issues become comparatively larger. Id., p. 95, citing R. Fisher, ed., "Fractionalizing Conflict," International Conflict and Behavioral Science: The Craigville Papers.

/24/ For a treatment of methods the collaborative negotiator may use to convince a traditional negotiator to embrace a collaborative approach, see Fisher and Ury, supra, pp. 101-148.

/25/ FRCP 26(b).

/26/ C. A. Wright, Law of Federal Courts, 2nd Ed. (1970), sec. 82.

/27/ See Chapter 2, supra.

/28/ Wright, sec. 86, p. 386.

EXHIBIT 4.1*

SAMPLE INTERROGATORIES TO DEFENDANT

IN THE DISTRICT COURT OF ________ COUNTY
STATE OF ________

State ex rel. __________________

____
Plaintiff,

vs.

____

____
Defendant.

Case No. _____

INTERROGATORIES TO DEFENDANT

Comes now the State of __________, at the relation of __________, and submits the following interrogatories to the defendant, to be answered fully and in detail by defendant within __________ days, as provided by Rule __________. These are intended as continuing interrogatories, with a duty in defendant to supplement his/her responses.

Instructions: Type your answers to the following interrogatories in the space provided on this form when possible. If the space provided is not sufficient to answer the interrogatory completely, type your answer on a separate piece of paper and attach it as an appendix hereto, noting on this form which appendix contains your answer to the interrogatory and noting on the appendix a reference to the interrogatory being answered. Upon completion, (give proper instruction regarding where and how to send responses).

1. State your full name, the date of your birth, and your present place of residence.

2. Do you live in an apartment or in a private house?

3. If you live in a private house, is it owned by either your spouse or any member of your family or a relative? If so, state when it was bought, for how much, and whose money was used.

4. How many rooms do you occupy?

5. Do you have a lease?

6. What is the name and address of your landlord?

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*Many of the interrogatories included herein have been adapted from Adams et. al., A Guide for Judges in Child Support Enforcement, pp. 71-75 (Rockville, MD: National Institute for Child Support Enforcement, 1982).

7. What is the amount of the rent?

8. Who pays the rent?

9. Is the rent paid by cash or by check?

10. Is the rent currently paid?

11. Have you any boarders or subtenants?

12. If so, give their names and the amount of rent paid by each.

13. If the rent or any other bills are paid by check, give the particulars thereof, the name of the drawer of such checks, and the banks on which they are drawn.

14. Are you married? If so, give your spouse's first name and maiden name if appropriate.

15. Have you any children? If so, give their names, ages, and addresses.

16. What is your usual occupation?

17. Are you currently in business or employed? If so, give the name and address of such business or employer.

18. What is your Social Security number?

19. If you are presently employed, state the particulars of any contract of employment and the amount of salary, commissions, or other compensation that you are to receive and the amount of any arrears thereof.

20. If you are married, please state:

    a) The date of your marriage;
    b) The number and names of all dependents for whom you are financiallly responsible.

21. If your spouse or any dependents are employed or in business, give the name and address of such employment or business.

22. If you are not the sole supporter of your family, state the amount of the contribution of each member of your family toward the support of your home.

23. If you are employed or in business, state whether you or any members of your family or other relatives are, or at any time were, proprietors, party owners, stockholders, directors, or officers of any such business.

24. State what business you have conducted and what positions you have held in the last 5 years.

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25. Are you an officer, director, or stockholder of any corporation? If so, give the details.

26. Is your spouse an officer, director, or stockholder of any corporation. If so, give the details.

27. Do you have, in your own name or jointly, any bank account, commercial savings, or otherwise? If so, state where and the amount of the balance therein.

28. When and where did you last have such a bank account?

29. Do you have power of attorney or other authority to sign checks or other instruments for the payment of money on any bank account?

30. Does your spouse have a bank account? If so, state the name and address of the bank and the amount of the balance therein.

31. State the source of the money in your spouse's bank account.

32. Have you or your spouse a safe deposit box? If not, when did you last have one?

33. Give the name and address of any bank or safe deposit company in which such a safe deposit box is or was maintained.

34. Have you the right of access to any safe deposit box?

35. Do you have any accident, health, or life insurance?

36. If so, give (a) the name of each company, (b) each policy number, (c) the amount, type, and date of issuance of each life insurance policy, (d) the name and address of the beneficiary of each life insurance policy, (e) the date and particulars of any change of beneficiary, and (f) the particulars of any assignment or assignments of life insurance policies.

37. Are you receiving or have you any claim for disability payments on any insurance policy?

38. If so, give the name of the company, the number of particulars of the policy, and the amount thereof.

39. Is there any fire insurance on the furniture in your home? If so, what is the amount, what is the name of the company issuing it, and in whose name is it issued?

40. Where are the policies of insurance referred to above?

41. If you have borrowed on any life insurance policies, what did you do with the money?

42. Are you a party to any contract of any kind?

43. Are you acting as executor, administrator, trustee, receiver, guardian, or in any other capacity under any will, agreement, or court appointment? If so, give the full particulars thereof.

44. Did you file Federal or State income tax returns in the last 3 years? If so, furnish copies of such returns.

45. Do you belong to any organization, club, or union?

46. Has any kind of license, permit, or appointment been issued or granted to you by any Federal, State, or city government or agency or department thereof? If so, give the details thereof.

47. Are you entitled to any money from any Federal, State, or city government or agency or department thereof? If so, give the details thereof.

48. Does anyone owe you money or goods? If so, give the details thereof.

49. Have you an automobile driver's license or chauffeur's license, and, if so, what car do you drive?

50. Do you or your spouse own or have any interest in any of the following:

(a) Real estate?
(b) Stocks, bonds, or other securities?
(c) Mortgages on real property or personal property?
(d) Promissory notes, drafts, bills of exchange, or other commercial paper?
(e) Judgments?
(f) Jewelry or antiques?
(g) Stamp collections or coin collections?
(h) Defense, war savings, or savings bonds?
(i) Automobile or truck?
(j) Patents, inventions, trade names, trademarks, or copyrights?
(k) Joint ventures or other business enterprises?
(l) Warehouse receipts, bills of lading, or other documents of title?

51. Do you or your spouse own or have interest in any other property not enumerated above?

52. If you or your spouse own any of the property described in questions 50 and 51, give the full particulars thereof.

53. Have you any securities with any stock brokerage firm?

54. Have you any account with any stockbroker or commodity broker? If so, give the particulars thereof.

55. When did you last have any such account? Give the full particulars thereof.

56. Have you now or did you ever have power of attorney or authority over any other stock, bond, or other security or commodity account? If so, give the full particulars thereof.

57. Have you filed any trade name certificates or partnership certificates? If so, under what name?

58. Are you, at the present time, listed as an heir, legatee, or devisee in any probate estate which has yet to be closed?

59. If your answer to the preceding interrogatory is yes, please list the name of the decedent and the location of the court which has assumed jurisdiction of the matter.

60. If any of your property is mortgaged, pledged, encumbered, or subject to any conditional bill of sale, give the full details and the status thereof.

61. Have you or your spouse any personal property in pawn? If so, give the particulars thereof.

62. Have you applied for a loan from any bank, finance company, or other lending institution in the last 3 years? If so, what disposition was made of such application?

63. Have you ever made an assignment for the benefit of creditors? If so, when and in what court?

64. Has a receiver of your property been appointed by any court?

65. Are there any outstanding executions, orders, or subpoenas in supplementary proceedings, garnishment executions, or orders for payment of money in supplementary proceedings under any other judgment against you? If so, give the particulars thereof.

66. What are your average monthly expenses and how are they met? Please itemize.

67. Are you making payments to any creditor? If so, give the full details thereof.

68. What is the total of your liabilities, exclusive of child support, and what are the names and addresses of your creditors?

69. When and for what purposes were these liabilities incurred?

70. What information can you give us regarding the other parties to any liabilities you have?

71 Are any of the other parties involved in any branch of the military service to the United States?

72. Are you unable to pay your debts?

73. Are you willing to be adjudged bankrupt?

74. What books and records do you keep showing your receipts and disbursements?

75. Within the past year, have you received any payments of money other than as already described? If so, state when and the amounts, give the particulars of any checks received, and state what was done with the money.

76. Have you assigned any cause of action, judgment, insurance policy, salary, income, or disability payments?

77. Have you transferred or sold any other property within the past 5 years? If so, describe the property and give the full details of any such transfer, including the names and addresses of the people you transferred the property to, when the transfer was made, and the amount given to you in exchange for the property.

Respectfully submitted,

____
Attorney for Plaintiff

CHAPTER 5

Establishment of Support Obligations

INTRODUCTION

This chapter discusses several legal and practical issues that confront the IV-D attorney who is presented with a case in which no support order has been established. For the purposes of this chapter, it will be assumed that paternity is not an issue or that a nonpaternity defense may be disposed of through on a legal presumption of paternity or estoppel theory. (For a full discussion of paternity, see Chapter 10.)

The first section discusses the developing trend toward use of formulas and other objective criteria for determining current support amounts. The Child Support Enforcement Amendments of 1984 require each State to establish guidelines for determining child support award amounts within the State. The second section discusses support in the form of medical benefits in lieu of, or in addition to, the more conventional financial monetary amounts. The third section covers jurisdiction for statutory claims for temporary and current support. The fourth section discusses claims by a State for reimbursement of support provided to an absent parent's family during a period in which no current support order was in effect. Temporary orders are discussed briefly in the fifth section. The sixth section surveys defenses that absent parents often assert to avoid the entry of a current support order. A discussion of modifications concludes the chapter.

GUIDELINES

In theory at least, all States determine a parent's support obligation by balancing three factors: the needs of the children, the financial situation of the custodial parent, and the absent parent's ability to pay. However, as of August 1983, some 29 States had no statutory declaration of the factors a court should consider in entering a current support order.[1] (This is despite 45 CFR 302.53, a 1975 regulation mandating States to establish a formula for determining support amounts where no order exists.) In such jurisdictions, the decision as to how much a parent should pay for child support is left entirely to the subjective evaluation of the court. At least two studies have suggested that child support obligations established in such jurisdictions are inconsistent and generally insufficient to meet the needs of the children.[2]

In an attempt to increase the credibility and use of objective criteria, a provision in the Child Support Enforcement Amendments of 1984 requires each State to establish, by October 1987, guidelines for determining child support award amounts within the State. Under 42 USC 667, States must establish such guidelines "by law or by judicial or administrative action," and make the guidelines available "to all judges and other officials who have the power to determine child support awards within such State."

The Federal statute does not require that the guidelines, once established and distributed, be binding on these judges and other officials, nor does it suggest methods for developing the guidelines. OCSE has made the requirement more specific by promulgating 45 CFR 302.56(c), which reads: "The guidelines must be based on specific descriptive and numeric criteria and result in a computation of the support obligation."

Perhaps to focus the court's analysis of the support issue, the Uniform Marriage and Divorce Act, section 309, instructs the court to consider a set of subjective criteria, in addition to "all relevant factors", as follows:

- The financial resources of the child
- The financial resources of the custodial parent
- The standard of living the child would have enjoyed had the marriage not been dissolved
- The physical and emotional condition of the child and his or her educational needs
- The financial resources and needs of the noncustodial parent.

OCSE followed suit in 1975 by promulgating a regulation that mandated each State child support enforcement agency to establish a formula for determining support amounts where no order exists.[3] 45 CFR 302.53 requires the formula to take the following factors into account:

- All earnings, income, and resources of the absent parent including real and personal property
- The earnings potential of the absent parent
- The reasonable necessities of the absent parent
- The ability of the absent parent to borrow
- The needs of the child for whom support is sought
- The amount of assistance that would be paid to the child under the full standard of need of the State's IV-A plan
- The existence of other dependents
- Other reasonable criteria that the State may choose to incorporate.

The Federal regulation does not require State courts to use the formula when establishing support orders. As a result, the regulation has had little effect, except in States that use an administrative process to establish support obligations.

Several attempts have been made to develop objective guidelines that result in predictable, consistent, and equitable support amounts. Judith Cassetty and Frank Douthitt provide a good discussion of this topic in "The Economics of Setting Adequate and Equitable Child Support Awards."[4] The discussion of guidelines here is based on this article.

According to Cassetty and Douthitt, there are three basic approaches to allocating the support responsibility between parents who do not reside in the same household, as follows:

- The cost-sharing approach
- The taxation approach
- The income-sharing approach.

Each of these approaches is discussed below.

Cost-Sharing Approach

The cost-sharing approach centers on the cost of raising the children involved in a case and allocates responsibility for that cost between the two parents based on their relative abilities to contribute. One example of a formula that adopts the cost-sharing approach and that has received a significant amount of attention in recent years, is the formula espoused by Maurice Franks, a family law specialist in Colorado.[5] Franks suggests the following formula:

$$OA = \frac{N \times A}{A + C}$$

and

$$OC = \frac{N \times C}{A + C}$$

where

N = Total financial needs of the children
C = Net income or earning ability of the custodial parent
A = Net income or earning ability of the absent parent
OC = Total support obligation of the custodial parent
OA = Total support obligation of the absent parent

Assuming a family of two children with an absent father earning \$18,000 per year, a custodial mother earning \$12,000 per year, and an estimated need figure for the children of \$769 per month,[6] the above formula produces the following proportional obligation amounts:

$$OA = \frac{\$769 \times \$1{,}500}{\$1{,}500 + \$1{,}000} = \$769 \times .60 = \$461.40$$

and

$$OC = \frac{\$769 \times \$1{,}000}{\$1{,}500 + \$1{,}000} = \$769 \times .40 = \$307.60$$

$$\text{Total} = \$769.00$$

In jurisdictions that have adopted this approach, such as the State of Oregon, the court generally assumes that the custodial parent is meeting his or her obligation by maintaining the primary home of the children, meeting their recurring needs, and perhaps incurring day care or babysitting expenses in order to work outside the home. After making this assumption, the court orders the absent parent to contribute the amount dictated by the formula (in our example $461.40). The custodial parent's share is assumed to make up the difference between the absent parent's contribution and the actual month to month needs of the children.

This approach is effective for allocating the support responsibility in situations, such as the above, where the parents are both employed and making modest to slightly above average incomes. The cost-sharing approach is not effective where the absent parent's income is significantly below or above the middle range. For low income absent parents, the cost-sharing approach does not resolve, nor purport to resolve, the conflict between the children's demands on the absent parent's income and his or her need to retain a minimal amount of income for self support. The other significant defect is that the focus on need can operate to place a cap on the amount which is ordered. If the needs of the children are determined to be $769 per month, based on the standard of living enjoyed by the family during the marriage, then the absent parent's support obligation cannot exceed that amount, no matter how high his or her income. Most jurisdictions make an upward adjustment by assuming that children's needs are elastic, and that they increase in a positive proportional relationship to the available income. The cost-sharing approach certainly does not prevent adjustments to account for low and high incomes, but neither does it suggest how to make such adjustments.

Taxation Approach

The taxation approach takes its name from its resemblance to income tax tables and from proposals in Wisconsin and California to implement collection of child support through the State income tax structure. The approach relies on tables which dictate the amount of child support as a percentage of the absent parent's income. For example, the State of Illinois recently enacted several identical statutes that dictate the amount of support to be awarded in various support proceedings.[1] These statutes read as follows:

> The Court shall determine the minimum amount of support by using the following guidelines:

Number of Children	Percentage of Net Income*
1	20%
2	25%
3	32%
4	40%
5	45%
6 or more	50%

> *Net income is defined as total gross income minus the following deductions:
>
> (1) Federal Income Tax (use standard tax)
> (2) State Income Tax (use standard tax)
> (3) Social Security Deductions
> (4) Mandatory Pension Deductions
> (5) Union Dues
> (6) Dependent Health/Hospitalization Insurance Coverage

> (7) Individual Health/Hospitalization Insurance Coverage or Medical Expense Deductions not to exceed $25 a month.
>
> In cases wherein health/hospitalization insurance coverage is not being furnished to dependents to be covered by the support order, the court shall order such coverage and shall reduce net income by the reasonable cost thereof in determining the minimum amount of support to be ordered.
>
> The above guidelines, including dependent health/hospitalization insurance coverage are binding in each case unless the court makes express findings of fact as to the reason for the departure below the guidelines. The guidelines may be exceeded by the court without express findings or by agreement of the parties. If the total gross income cannot be determined because of default or any other reason, the court shall order maintenance or support or both in an amount considered reasonable in the particular case.
>
> Debts owed to private creditors are not to be considered in establishing a support obligation. Previous support orders and maintenance orders may be considered if the obligor is paying them. (Emphasis added.)

The taxation approach focuses on ability to pay and assumes that all children have minimum needs that comprise a constant percentage of the absent parent's net income. Where a child has additional financial needs, the custodial parent must convince the court to deviate above the guideline amount. The statute makes it difficult for the court to enter an order in an amount lower than the guideline by requiring express findings to support such an order.

This approach has several clear advantages and a few less obvious disadvantages. By defining net income as gross income less a list of specific allowable deductions, the statute standardizes and simplifies the process of applying the guideline to each individual case. For instance, the great majority of cases will no longer require evidence regarding the actual expenses incurred by the custodial parent for the support of the children. The court, in effect, can take judicial notice that the needs of the children bear a direct relationship to the absent parent's net income.

Similarly, due to the statutes' reliance on standard tax rates, the Federal and State income taxes actually withheld from the absent parent's paycheck are not relevant. In addition, the prescribed list of deductions, in combination with the last paragraph of the statute, prevents any dispute as to the effect of other debts owed by the absent parent.

One drawback of the Illinois statutes concerns the Dependent Health/Hospitalization Insurance Coverage. The statute does not specify the level of coverage the absent parent is to provide, and yet the court must have evidence of the cost of the coverage in order to apply the formula. Such a situation may present difficulties to attorneys in cases where the level of coverage and cost cannot be stipulated prior to a hearing. The attorneys will need to present evidence of the cost of health insurance coverage but will not know in advance of the hearing what level of coverage the court will require. Presumably, judges will set a precedent over time that will allow attorneys to anticipate the appropriate level of coverage. This practical problem points out that practicing attorneys need to participate in the initial drafting and subsequent revision of support guidelines.

Taxation approaches have two additional disadvantages. One involves the underemployed absent parent. Strict application of the statutory percentage to the low income obligor may provide neither adequate support for the children nor sufficient income for the absent parent.[8] Also, such guidelines, though intended to be minimum support contributions, may in practice become a ceiling on amounts awarded.

Income-Sharing Approach

The income-sharing approach assumes that parents should continue to share the economic function of parenting to the fullest extent possible, despite the breakup of the family household. Income-sharing formulas, therefore, seek to go beyond the children's minimum needs. An additional component allows for the sharing of "surplus" available income on an equitable basis. Cassetty and Douthitt [9] provide the following formula, again assuming a two child situation, an absent parent who has not remarried and lives alone with a net income of \$1500 per month, and a full-time custodial parent with a net income of \$1000 per month:

$$\text{CS} = \frac{\begin{array}{c}\text{Income of}\\\text{Absent Parent}\end{array} - \begin{array}{c}\text{Poverty Level}\\\text{for 1}\end{array} - \begin{array}{c}\text{Income of}\\\text{Custodial Parent}\end{array} - \begin{array}{c}\text{Poverty Level}\\\text{for 3}\end{array}}{4}$$

$$= \frac{(1500 - 405) \quad - \quad (1000 - 685)}{4}$$

$$= \frac{780}{4} \quad = \quad \$195 \text{ (per person share of "surplus" income)}$$

$$= \quad \$585 \text{ per month (3 shares of "surplus" income)}$$

The numerator of this formula calculates the amount of surplus income available to the two-household family after covering all four individuals' minimum needs. The poverty level figures are estimates drawn from reports by the U.S. Department of Agriculture and the U.S. Department of Labor. The denominator represents the total number of individuals to be supported in both households. The resulting figure represents a per-person share of the surplus income. The child support amount would be \$585 per month (3 shares of surplus income).[10]

The income-sharing approach has several advantages. Most importantly, it accounts for some variances both in need and ability to pay--the only approach of the three that can claim to do so. It accounts for the realities of the low income obligor by granting a minimum needs allowance before requiring a support contribution (the court presumably could impute income to an underemployed obligor). The reliance on poverty level figures again replaces the need to adduce evidence as to the actual costs of supporting the children, and allows the formula to be adjusted by region or for the disparate costs between urban and rural life. The income-sharing approach is perhaps best at taking into account household economies of scale and changing financial conditions over time. Once the formula is applied to a case, modification proceedings often can be avoided by simply reapplying the formula and stipulating to an order based on the new end result.[11]

Guidelines in the Appellate Courts

A body of appellate case law is developing regarding the legality and desirability of mandatory and advisory support guidelines at the State and local levels. The emerging rule is not unanimous, but appellate courts have been approving the concept.

For instance, in Smith v. Smith, 290 Or. 675 , 626 P2d 342 (1981), the Oregon Supreme Court studied the methods courts in that State use to award child support. The court noted that most of the State's courts employed a case-by-case approach, and that "the appearance of uniformity among support orders is lacking." [Supra, p. 345.] The decision noted that this lack of uniformity causes a greater percentage of cases to require court hearing to establish a support amount; that settlements, even when successful, are more difficult to achieve, and that more cases are appealed than would be in a system with certainty and predictability.

In discussing the adoption of a Statewide formula approach, the court first rejected the use of the support regulation developed by the IV-D agency as being exclusively appropriate for low income level custodial parents with full-time physical custody. [See OAR 137-50-010.] Apparently the court wanted to develop a more flexible approach to allow for its use in shared physical custody situations and multiple income situations. Next, the court rejected use of the schedule or percentage approach (similar to the taxation approach discussed above) because it does not take into account the custodial parent's income. The court further concluded that a schedule or percentage approach does not work well in cases where the absent parent's income is very high. The court noted that the costs of raising children do not increase at a constant rate with increasing parental incomes, especially above about $2000 per month.

The court felt that these deficiencies are best minimized by a formula approach, tempered by the trial court's discretion. The formula chosen by the court was the cost-sharing formula proposed by Maurice Franks. [See 86 Case & Comment 3 (1981) and the discussion above.] After the court has received a petition for support (see Exhibit 5.1), it applies the formula to the facts of the case; the trial courts in Oregon now are directed to adjust the support amount after considering the following factors:

- The interrelationship of child support with the division of property and spousal support
- The indirect forms of child support, including payments for medical care, life insurance in the child's name on the parent's life, a trust for the child's education, insurance for hospital, medical or dental expenses and so forth
- The income of the domestic associate or present spouse of each parent
- The amount of assets of each parent, including the amount of equity in real or personal property
- The existence of any support obligations to other dependents of each parent
- The special hardships of each parent.

In Hamilton v. Hamilton, 290 SE2d 780 (N.C.App. 1982), the North Carolina Court of Appeals stated, in dicta, as follows:

> . . . the Court wishes to lend its approval to the employment of . . . guidelines by many trial courts and to encourage their use by others. A review of the caselaw underscores the total lack of consistency in the amounts of child support awarded by the courts. Moreover, the route by which the court arrived at a particular award is too often impossible to fathom.
>
> We concede that each domestic case is unique and that there must be an element of judicial discretion in setting the amount each parent should contribute to the support of his or her children. Such discretion, however, should not be unfettered. Employment of a standard formula . . . would take into account the needs and resources of the parents, as well as the needs of the children, and would result in fair apportionment of responsibility in the majority of cases. While many others might not fit neatly into the established guidelines, the formula would provide a starting point for negotiations or formulation of judicial remedies. In cases where the trial judge determines, in his discretion, that considerations of fairness dictate a substantial departure from the standard award, we would recommend strongly that the court set forth specific findings of fact in support thereof. This would provide appellate courts with something more than the skeleton findings and conclusions on which we must often base our review of support orders.

Likewise, the Supreme Court of Pennsylvania recently held that a formula approach is preferrable to a system that simply refers to numerous general principles embodied in case law and subjectively worded statutes. [Melzer v. Witsberger, 480 A2d 991 (Pa. 1984).] In Melzer, p. 994, the court noted that there is a "total lack of organization with respect to how these principles interact and how they should be applied in order to arrive at an appropriate award of support." The decision responded by requiring Pennsylvania courts to apply an adjusted cost-sharing formula to each case, after first determining the cost figure based on evidence of the children's needs, and the needs, customs, and financial status of the parents. The adjustment allows both parents to deduct their reasonable living expenses from their net incomes, prior to applying the cost-sharing formula to determine their respective support obligations. Thus, the formula adopted by the court is as follows:

$$\text{Mother's total support obligation} = \frac{\text{Mother's income available for support}}{\text{Mother's income available for support} + \text{Father's income available for support}} \times \text{Needs}$$

$$\text{Father's total support obligation} = \frac{\text{Father's income available for support}}{\text{Mother's income available for support} + \text{Father's income available for support}} \times \text{Needs}$$

After calculating the respective total obligations, the trial court is to determine what portion may be met by support provided directly to the child, and enter an order requiring the absent parent to pay that amount on a regular basis.

In Bakke v. Bakke, 351 NW2d 387 (Minn.App. 1984), the Minnesota Court of Appeals held that neither the fact that the absent parent's monthly living expenses exceeded his income nor the fact that his relationship to the child was by way of adoption justifies a trial court's deviating from the Minnesota mandatory guidelines. [Minn.Stat.sec. 518.551, Subd. 5 (Supp. 1983).] The guidelines themselves were approved as being applicable to non-public assistance child support cases in Halper v. Halper, 348 NW2d 360 (Minn.Ct.App. 1984).

One appellate decision holds that guidelines developed locally may not be used without giving the absent parent an opportunity to review or challenge them. [Powell v. Powell, 433 So2d 1375 (Fla.App.2dDist. 1983).] The Powell court held that their use violates both a State statute that proscribes a court's resort to extrinsic documentary evidence and a State statute that requires the court to balance all equitable principles and factors in reaching its decision regarding child support.

Establishing Need

Public policy as embodied in the guideline requirement of the Child Support Enforcement Amendments of 1984 dictates that support obligations fairly reflect a balance between the needs of the family and the absent parent's ability to pay. Given that the goals of the IV-D Program include both offsetting the cost of the AFDC Program and helping all single parent families to become more self-sufficient, this philosophy hardly can be disputed. Unfortunately, the practice in the Program often has been less than successful in meeting this objective. For instance, an unpublished study by the Missouri Division of Family Services for the Missouri Legislature in 1982 indicated that the amount of the average support order in IV-D cases in that State actually declined during the first 5 years of the program, despite inflation and a prioritization system which selected cases according to ability to pay.

Attorneys in the Program bear a great responsibility to use the resources and remedies at their disposal to ensure that courts have sufficient information to strike an appropriate balance, and to present information in a straightforward, usable manner. Many jurisdictions use the AFDC grant amount as a guideline and suggest that the court aim for that amount in setting its order. This approach not only violates the Federal regulations [45 CFR 302.53 and 302.56], it ignores the fact that, in many States, AFDC grant amounts are based on a percentage of the "full standard of need" established by the State IV-A agency to estimate the minimal financial needs of a child. The full standard of need amount, when updated for inflation, might prove a better guideline for the average child and might represent an acceptable criteria under the Federal regulations. However, using it alone clearly ignores the living circumstances of all the parties involved, and does not take into account the absent parent's ability to pay.

As noted above, some jurisdictions have built standardized need estimates into their objective formulas. In such jurisdictions, it is necessary to adduce evidence regarding the children's needs only where they have special needs or where the attorney is asking the court to enter an order that deviates from the formula. It might be possible to use similar need estimates in jurisdictions that have yet to develop guidelines by laying a foundation for introduction of published government studies into evidence. Unfortunately, in most jurisdictions, an expert witness must lay the foundation, making the procedure too cumbersome.

In the short run, attorneys in most jurisdictions will have to fill the record with testimony from the custodial parent regarding recent relevant expenses. Court rules in some jurisdictions require that all parties to support hearings submit financial statements, in the form of affidavits, before requesting a hearing date. By local practice, once such a rule is established, the testimony of the parties becomes structured around the affidavit, and the financial information is presented to the court in the same manner in every case. Such a practice makes determination of the obligation much easier on the court, lessens the chance that an item of evidence will be omitted mistakenly by counsel for one of the parties, and adds some predictability to the outcome. Even where there exists no mandatory statute or rule, the practice can be instituted voluntarily by the IV-D attorney simply through consistent usage. An example of an affidavit that could be used in such a manner is included in the appendix to this chapter as Exhibit 5.2.

Establishing Ability to Pay

Most families who receive support enforcement services from the IV-D Program lack significant financial resources. As a result, the absent parent's ability to provide financial support generally will be the most important determinant of the support award. Therefore, it is crucial to obtain accurate and complete information regarding the absent parent's present and past financial situations. In determining the financial condition of the absent parent at the time the order is entered, most courts will take into account past and present earnings, and anticipated earning capacity in the future. [Pencovic v. Pencovic, 45 Cal.2d 97, 287 P2d 501 (1955); In re Marriage of Vanet, 544 SW2d 236 (Mo.App. 1976).] A court may base its order on what the absent parent could earn by using his or her efforts to obtain employment suitable to his or her capabilities. [Foster v. Foster, 537 SW2d 833, 836 (Mo.App. 1976).]

Congress and State legislatures have made some very effective information sources available to Program investigators, but the income and asset information rarely comes in a form which is admissible as evidence in court. Thus, the IV-D attorney must develop routine methods of obtaining such information in submissible form. As noted in Chapters 4 and 10, this often involves the use of discovery devices. A set of form interrogatories is included in the appendix to Chapter 4. [See Exhibit 4.1.] While interrogatories may not be feasible in every case, especially where the absent parent is not represented by counsel, a set of thorough interrogatories still can provide an effective interview and cross-examination outline.

Perhaps the most important technique for guaranteeing that complete and accurate information is available in most cases is to make liberal use of subpoenas duces tecum to employers and other information sources. Mere reliance on pay stubs can be misleading. Pay stubs often do not reflect benefits which are not paid in cash, such as membership in prepaid medical, dental, and optical programs, and other forms of insurance that should be taken into account in determining the amount of the obligation and in fashioning the medical support portion of the order. Many Program attorneys routinely subpoena bank account records. The flow of money through a checking or savings account is often a better indication of an individual's income than more conventional sources, which can be difficult to identify. Another good source is tax returns for past years, which in most States are discoverable. [70 ALR2d 240 (1960) (1978 Supp.).]

MEDICAL SUPPORT

Section 16 of the Child Support Enforcement Amendments of 1984 requires State IV-D agencies to pursue medical support in addition to financial support. Federal statute 42 USC 652(f) directs the Secretary of Health and Human Services to issue regulations requiring the States to petition to include medical support as a part of any child support order obtained by the agency, whenever health care coverage is available to the absent parent at reasonable cost and the custodial parent does not have satisfactory health insurance coverage for the children. Regulations at 45 CFR 306.51(a) define "reasonable cost" as the cost of employment-related or other group health insurance.

The Conference Report on the Child Support Enforcement Amendments of 1984 included a strong statement of public policy behind the requirement as follows:

> . . . the conferees believe the best long-run solution to achieving medical insurance coverage for all families is the use of private medical insurance which is or can be made available through a parent's employer.
>
> The conferees direct the Secretary of HHS to examine additional administrative, regulatory and legislative possibilities to fully and vigourously use this private coverage, and report to the Finance Committee and the Ways and Means Committee by January 1, 1986 on actions taken. [12]

The new provision of the law clearly views providing for the medical needs of the child as an integral part of a parent's duty to support. While medical support may take other forms in specific situations, medical insurance is preferred because it is relatively inexpensive for the absent parent, provides for the needs of the child, and is easy for the State to monitor without additional and costly case-by-case modification. Providing private insurance coverage for children who otherwise would depend on Medicaid will reduce the public costs in supporting these children and result in significant Medicaid cost savings for State and Federal Governments.

In addition to the requirement to obtain medical support orders, the Social Security Act contains provisions at 42 USC 1302 and 1396(k), allowing the State IV-D agency to assist the State Medicaid agency in enforcing medical support obligations. The accompanying regulations at 45 CFR 306, Subpart A, provide for an optional cooperative agreement between the two agencies. Under a cooperative agreement, the IV-D agency agrees to perform one or more of the following activities for cases in which Medicaid has secured an assignment of medical support rights:

- Receive referrals from the Medicaid agency
- Locate the absent parent, using the State Parent Locator Service and the Federal Parent Locator Service, as needed

- Establish paternity if necessary
- Determine whether the parent has a health insurance policy or plan that covers the child
- Obtain sufficient information about the health insurance policy or plan to permit the filing of a claim with the insurer
- File a claim with the insurer; transmit the necessary information to the Medicaid agency or to the appropriate State agency or fiscal agent for the filing of the claim; or require the absent parent to file a claim
- Report to the Medicaid agency, in the most efficient and cost-effective manner available, all information collected pursuant to 45 CFR 306.5(a) and (b)(1).
- Secure health insurance coverage through court or administrative order when it will not reduce the absent parent's ability to pay child support
- Take direct action against the absent parent to recover amounts necessary to reimburse medical assistance payments when the absent parent does not have health insurance and the amounts collected will not reduce the absent parent's ability to pay child support
- Receive medical support collections
- Distribute the collections as required by 42 CFR 433.154, including calculation and payment of the incentives provided for by 42 CFR 433.153
- Perform other functions as may be specified by instructions as may be specified by instructions issued by OCSE.

The Federal regulations also set forth administrative requirements that must be met through the cooperative agreement entered into by the agencies. They also require that the Medicaid agency fully reimburse the IV-D agency for the latter's medical support enforcement activities under the agreement.

JURISDICTION

Actions that seek to obtain a support order against a parent are in personam actions, and the court must obtain jurisdiction over that parent by personal service of process pursuant to State statute or rule. [In re Johnston, 33 Wash.App. 178, 653 P2d 1329 (1983).] The statute or rule which allows for service must meet the due process notice requirements established by the U.S. Supreme Court in Mullane v. Central Hanover Bank & Trust, 339 US 306, 70 SCt 652 (1950). The State also must possess the "minimum contacts" defined by International Shoe v. Washington, 326 US 310, 66 SCt 154 (1945), such that the exercise of jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. What do these standards mean when applied to the establishment of child support obligations?

Most States have adopted a statute or court rule that extends State court jurisdiction in a divorce action to spouses who reside out of State if the parties to the marriage lived in the State immediately prior to their separation. [See, for example, Wisc.Stat.Ann. sec. 247.57; Kan.Code Civ. Proc. sec. 60-308, subd.(b).] If the facts meet the requirements of the statute, or if the absent parent's contacts with the State are clear and the State has a general long-arm statute that could form the basis of the court's jurisdiction, then it should be possible to obtain jurisdiction over him or her by way of extraterritorial service of process.

In the absence of some clear, recent connection between the absent parent and the forum State, it is difficult for a State court to exert jurisdiction over an absent parent to justify the entry of a support order. The Supreme Court ruled that neither the fact that the parties were married during a brief visit to the forum State nor the fact that the defendant allowed the children of the marriage to reside in the forum State constitutes acceptable minimum contacts under the International Shoe test. [Kulko v. Superior Court, 436 US 84, 98 SCt 1690, 56 LEd2d 132 (1978).]

More significant than the specific holding in the case was the attitude that the Court took in restricting extraterritorial jurisdiction in the child support context. The existence of an action under URESA was noted as a less restrictive alternative that protects the State's interest (i.e., providing a remedy for the support of the State's children) without causing a hardship on the out-of-State absent parent. This language does not bode well for future attempts to expand the jurisdiction of State courts in establishment cases. However, in Miller v. Kite, 318 SE2d 102, (N.C.Ct.App. 1984, the court held that a father's allowing a child to reside in North Carolina for 9 years and benefit from public education constitutes sufficient minimum contacts to confer jurisdiction over him for purposes of establishing a child support obligation. Likewise, in In re Highsmith, --- NE2d ---, 11 FLR 1247 (Ill. 1985), the Illinois Court of Appeals held that an absent parent who "dumps" a child with its grandparents and then leaves the State possesses sufficient contact with the State to allow for jurisdiction.

Some statutes and older decisions would support the entry of a support order based on in rem jurisdiction, that is, jurisdiction over the defendant based on seizure of an item of real or personal property owned by the defendant and located within the territorial jurisdiction of the court. [See, for example, Jenkins v. Jenkins, 246 Pa.Super. 455, 371 A2d 925 (1977).] Since the U.S. Supreme Court's decision in Shaffer v. Heitner, 97 SCt 2569, 53 LEd2d 683 (1977), in rem jurisdiction is limited to actions concerning the piece of property seized. Because it is logically impossible for this condition to apply to the child support establishment process, it is unlikely that in rem jurisdiction is an option.

JURISDICTION OVER MILITARY ABSENT PARENTS

Frequently, a child support enforcement attorney must obtain a support order against an absent parent who is serving out-of-State in the military or who fails to respond to service of process within or without the State. Before moving for entry of a default judgment in such situations, the child support attorney should consult the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 USCS Appx. sec. 520. The Act establishes certain duties and obligations on plaintiffs, courts, and defendants in legal proceedings, including actions to establish support, and creates certain rights and remedies for defendants. It provides as follows:

> Sec. 520. Default judgments--Affidavits--Bonds--Attorneys for person in service---(1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment, shall file in court an affidavit setting forth fact showing that the defendant is not in military service. If unable to file such affidavit, plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service, the court may require, as a condition before judgment is entered, that the plantiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the right of the defendant under this Act [Secs. 501 et seq. of this appendix]. Whenever, under the laws applicable with respect to any court, facts may be evidenced, established, or proven by unsworn statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury, the filing of such an unsworn statement, declaration, verification, or certificate shall satisfy the requirement of this subdivision that the facts be established by affidavit.
>
> (2) Any person who shall make or sue an affidavit required under this section, or a statement, declaration, verification, or certificate certified or declared to be true under penalty of perjury permitted under subdivision (1), knowing it to be false, shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed 1 year or by fine not to exceed $1,000, or both.
>
> (3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such a case, a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act [Secs. 501 et seq. of this

> appendix] to protect a person in the military service shall have power to waive any right to the person for whom he is appointed or bind him by his acts.
>
> (4) If any judgment shall be rendered in any action of proceeding governed by this section against any person in the military service during the period of such service or within 30 days thereafter, and it appears that such person was prejudiced by reasons of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than 90 days after termination of such service, be opened by the court rendering same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act [Secs. 501 et seq. of the appendix] shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.

As the language of the Act discloses, its duties and obligations arise whenever a plantiff seeks to obtain a default judgment in a civil action. The rights and remedies apply whenever the defendant is in the military.

Clearly, the Act's provisions apply in matrimonial actions. [See Anno: "Soldiers' and Sailors' Civil Relief Act, as amended, as affecting matrimonial actions," 54 ALR2d 390.] Thus, before seeking a default judgment in a support action, the child support enforcement attorney must comply with the requirements of the Act.

Where it is clear that the absent parent is not an active member of the military, the Act simply requires that an affidavit to that effect be filed with the court. Most courts have built this requirement into their routine default judgment procedures. Presumably, the affidavit may be sworn out by either the child support attorney or the custodial parent, depending on who signs the petition for support.

If the defendant is in the military, the Act is more difficult to apply. Where the cause of action involves complicated issues and extensive trial preparation, the defendant's being in the military no doubt would adversely effect his or her ability to present a defense. The Act would require dismissal or a stay until circumstances change. However, the case law that has developed under the Act recognizes that such prejudice should not be assumed.

It is well established that a trial court has wide discretion in determining whether a defendant's service in the military would undermine his or her ability to defend an action. [54 ALR2d 392.] The issue generally finds its way into the reported appellate case law after a defendant seeks to have a default judgment set aside and is refused relief by the court that entered the order. These decisions provide valuable guidance for courts at the trial level. As the above-cited annotation points out, the Act does not delegate the burden of proof on the issue of adverse effect. In other words, the plaintiff need not prove that the defendant's service in the military will not adversely affect his or her ability to prepare for and defend the action. The court is to consider all the information available from either party in deciding whether or not to let the action proceed. Thus, the defendant is not entitled to a stay merely by filing a motion requesting relief. [Cadieux v. Cadieux, 75 So2d 700 (Fla. 1954); Gates v. Gates, 197 Ga. 11, 28 SE2d 108 (1943); Luckes v. Luckes, 245 Minn. 141, 71 NW2d 850 54 ALR2d 384 (1955).]

Where the court determines that the defendant would not be adversely affected by commencement of the suit, the Act requires the court to appoint an attorney to represent defendant's interests and authorizes the court to require the plantiff to post a bond to indemnify the defendant against any loss or damage that the resulting judgment might cause. The court further is authorized to make other orders or judgments as necessary to protect the defendant's rights. Clearly, in some fact situations it is appropriate for the court to enter a default judgment or allow the action to proceed to judgment after appointing counsel for the absent parent.

A number of decisions have refused to set aside default judgments against military defendants, many involving divorce decrees that were not challenged until the plaintiff sought to enforce the support provisions. [See for instance Krumme v. Krumme, 6 Kan.App.2d 939, 636 P2d 814 (1981); Swartz v. Swartz, 412 So2d 461 (Fla.App. 1982).] Moreover, a significant body of case law holds that a default judgment entered against a defendant in the military is merely voidable and not void. [Radlinski v. Superior Court of Santa Barbara County, 186 Cal.App.2d 821, 9 Cal.Rptr. 73 (1960); Courtney v. Warner, 290 So2d 101 (Fla.App. 1974); 35 ALR Fed. 649.] The Courtney case is particularly interesting; it holds that a default judgment entered by a Tennessee court is entitled to full faith and credit in Florida despite the defendant's allegation that the plaintiff in the Tennessee action did not comply with the Act.

A defendant in a support action is not entitled to relief per se as a result of his military service. Nevertheless, because the Act was designed to prevent prejudice to military defendants, a plaintiff may have difficulty convincing a judge to proceed with a support action without the defendant's presence. The argument to the court should proceed as follows. The only relevant issues are the needs of the children and the absent parent's ability to pay. The needs of the children can be established at the hearing through the testimony of the custodial parent. If the absent parent has been away in the military for an extended period of time, in most cases he or she will not be able to contradict the custodial parent's testimony. The attorney appointed on behalf of the absent parent will be able to cross-examine the custodial parent to the same extent whether the absent parent attends the hearing or not.

The evidence regarding the absent parent's ability to pay generally will have been obtained through his or her affidavit, answers to interrogatories, or the military discovery process. No matter what route is taken to obtain the evidence, the absent parent will have ample opportunity to review the information presented to the court and to prepare a counterposition should he or she disagree with the plaintiff's evidence. Thus, except in cases where the children have special needs or the absent parent has an unusual defense to the obligation, going forward with the hearing on a petition for support without the attendance of the military absent parent should not be prejudicial, as long as he or she is represented by counsel.

REIMBURSEMENT CLAIMS

Nationally, about one-third of new AFDC families are the beneficiaries of a current support order. Of the remaining two-thirds, about half are cases in which paternity has not been established. Thus, about one-third of new cases involve children whose parentage is not in dispute but who, for a variety of reasons, do not have the benefit of an enforceable support order.

This situation arises for several distinct reasons. Usually, the spouses simply have separated without benefit of court involvement. Perhaps they do not wish to finalize their dispute in a divorce; the State in which they made their marital home may make it difficult and expensive to dissolve a marriage; or the waiting period may be long and neither of the parties may be inclined to seek temporary relief or access to legal services. Alternatively, divorce may have been entered, but because the plaintiff-spouse did not know the whereabouts of the absent spouse, the court was unable to enter a support order. Whatever the cause, the situation requires the establishment of a support order.

Due to the excessive caseloads facing most State child support enforcement agencies, and the several months it can take to locate an absent parent, several thousand dollars in AFDC and Medicaid benefits may be paid out prior to a case being referred for legal action. The issue for discussion here is: Is there a legal remedy that allows the State to seek reimbursement of public assistance paid to an absent parent's family during the period prior to entry of a current support order?

Statutory Remedies

Several States authorize the IV-D agency to establish enforceable support obligations through administrative notice and hearing processes. (Administrative processes are discussed in detail in Chapter 8.) Typically, such a statute will provide that, in the absence of a current support order, the payment of public assistance to or for an absent parent's child creates a debt due from the parent or parents in the amount of the AFDC provided.[13] Other States, such as California, Kansas and Texas,[14] have created a similar obligation, which may be determined and enforced judicially. In many States, no statutory treatment of this issue exists, and the attorney must resort to a claim based on common law principles.

The Common Law Remedy

Blackstone frequently is quoted in support of the proposition that no civil action existed at common law for support of a minor child. [1 Bl. Comm. 449; Greenspan v. Slate, 12 N.J. 426, 97 A2d 390 (1953).] As the New Jersey Supreme Court points out in its decision in Greenspan, pp. 391-393, Blackstone's conclusion is not entirely accurate when applied to the common law as it developed in this country.

As early as 1371, an action existed in the English ecclesiastical courts against the alleged father of an illegitimate child, both for current support and for reimbursement of sums the mother expended from her own estate in supporting the child.[15] During the same period, the law courts were applying an agency theory to require a father to repay third persons who provided necessaries to the father's legitimate children. In England, the evidence of agency or apparent agency had to be specific. [Greenspan, supra, p. 392, citing Mortimore v. Wright, 6 M.&W. 482 (Exch. Div. 1840) and Shelton v. Springett, 11

C.B. 452 (Com. Pl. 1851).] Both in England and in the United States, common law allowed third parties to recover for necessaries provided to a man's wife. For this action, no showing of express agency was necessary.

Many U.S. courts merged these two theories to create a cause of action on behalf of the mother, as well as on the behalf of third parties, for reimbursement of necessaries provided to children. These courts either inferred agency from very slight evidence, or acted as though the action existed in English common law without the agency requirement. [See Freeman v. Robinson, 38 N.J.L. 383, 384 (Sup.Ct. 1876); Penningroth v. Penningroth, 71 Mo.App. 438, 441 (1897).] As a result, it is not always clear whether the decisions infer the existence of an agreement, or whether the agreement is merely a legal fiction the court employs to enforce the moral duty. There is also some confusion as to whether the action is an action at law[16] or in equity.[17] Whatever the nature of the claim, it is firmly established in a majority of American jurisdictions. [91 ALR3d 530; Fanelli v. Barclay, 100 Misc.2d 471, 419 NYS2d 813 (1979); Jenkins v. Jenkins, 246 Pa.Super. 455, 371 A2d 925 (1977); Toy v. Cherico, 367 A2d 651 (Del.Super. 1976); Franklin v. Julian, 30 Ohio St.2d 228, 283 NE2d 813 (1972); Calig v. Shrank, 179 Conn. 283, 426 A2d 276 (1979) (dicta, recognizing that the action exists in New Jersey); Weinstein v. Weinstein, 148 So2d 737 (Fla.App. 1963); Dawson v. Dawson, 135 SW2d 458 (Tenn.App. 1939); Jameson v. Jameson, 306 NW2d 240 (S.D.,1981); Watkins v. Dudgeon, 270 Ark. 56, 606 SW2d 78 (Ark.App. 1980); Brown v. Brown, 269 NW2d 819 (Iowa 1978); York County v. Johnson, 206 Neb. 200, 292 NW2d 31 (1980); Mobley v. Baptist Hosp. of Gadsden, 361 So2d 16 (Ala.Civ.App. 1978); Fauntroy v. U.S., 413 A2d 1294 (D.C. App. 1980); Allison v. Fulton-Dekalb Hosp. Auth., 245 Ga. 445, 265 SE2d 575 (1980); Lane v. Aetna Cas. & Sur. Co., 48 N.C. App. 634, 269 SE2d 711, rev. den. 276 SE2d 916 (1980); Marks v. Mitchell, 90 W.Va. 702, 111 SE 763 (1922); Hartley v. Ungvari, 318 SE2d 634 (W.Va.Sup.Ct.App. 1984).]

Under the common law theory, a claim for reimbursement of necessaries accrues against a child's father to any person who has provided the child with food, shelter, clothing, medical attention, or education. [Hooten v.Hooten, 15 SW2d 141 (Tex.Civ.App. 1929).] The cause of action looks to the past, not the future. In most jurisdictions, a statutory support order substitutes for the common law obligation, at least as to the children's mother. The statutory support order looks to the future and acts to limit any future recovery by the custodial parent to the amount of the order. [Lodahl v. Papenberg, 277 SW2d 548 (Mo. 1955).] The effect of an existing current support order on the claims of third parties varies from jurisdiction to jurisdiction. [91 ALR3d 561.] As pointed out above, this discussion assumes no support order.

The common law claim in the IV-D context. A claim for reimbursement of necessaries may be useful to the IV-D agency in the following situations:

- An action is being pursued to establish a current support obligation, and the AFDC case has been open for a number of months prior to the filing of the support action.

- A paternity action is being pursued, and the AFDC case has been open for a number of months.

- The AFDC case that formed the basis of the IV-D referral has closed, and the case promises good collection potential.

- An enforcement action has produced a collection (for instance, a Federal tax refund interception), and the absent parent responds with a collateral attack, or other challenge, on the order which forms the basis of the collection.

Some argue that the addition of the common law claim to a IV-D agency's arsenal of collection weapons would have little effect. After all, it is difficult enough to collect current support from the majority of absent parents pursued by the IV-D Program. In addition, the burden of repaying the agency for past assistance often would limit the absent parent's ability to pay current support. Such an argument is misleading, however; common law claims can strengthen the agency's negotiating position in every case and allow cases to be worked that would otherwise be shelved. The last two situations noted above are particularly good examples. The agency already has spent time and effort on these cases, and the common law claim may turn this effort into collections instead of frustration.

In evidence of the usefulness of the common law claim in the IV-D context, at least three State child support enforcement agencies have obtained appellate decisions which establish the vitality of the claim on behalf of the State. In State Division of Family Services v. Clark, 554 P2d 1310 (Utah 1976), the Utah Supreme Court held that the State may recover amounts of public assistance provided in the past despite the lack of a support order for the period in question. The court noted that the parent's obligation is rooted in natural law as an implied promise contained in the marriage contract. The obligation runs to the children, but when a third party comes forward and assumes the parent's responsibility, that party becomes subrogated to the child's right and may obtain reimbursement. [Clark, supra, p. 1311.] The court did not address the specific issue of whether the State may qualify as a "third party" under the common law rule, but simply assumed no impediment.

The Montana Supreme Court also treated the issue in the case of State by and through Department of Social and Rehabilitative Services v. Hultgren, 168 Mont. 257, 541 P2d 1211 (1975). There, the decision specifically held that the State agency that assumes the support responsibility qualifies as a third party under the common law rule and is entitled to reimbursement. [Also see State Division of Family Services v. Hollis, 639 SW2d 389 (Mo.App. 1982).] In addition to making a claim against an absent parent under the third party liability theory, it would seem to be possible to assert the claim through the custodial parent via the assignment of support rights required of all AFDC recipients by 42 USC 602(a)(26).

Elements of the cause of action. In the majority of jurisdictions, the elements of the cause of action are simple to allege and establish. At common law, the obligation ran to the father and simply stated that he was liable to reimburse any third party who came forward to supply reasonable and necessary support for his wife and/or children. The elements of the cause of action were as follows:

- Paternity in the defendant
- No court order for support entered by any court
- His failure to provide support
- Provision of support by the plaintiff

- Necessity
- Reasonableness of the support provided.

In the majority of States, the cause of action remains as set forth here, except that it presumably extends to claims against mothers as well as fathers, at least in States which have enacted an equal rights constitutional amendment. [91 ALR3d 530.] However, courts in a few States have added requirements that create obstacles for the IV-D programs, such as:

- A requirement that the plaintiff first demand that the absent parent meet the obligation prior to assuming it and seeking reimbursement [McSwain v. Holmes, 269 S.C. 293, 237 SE2d 363 (1977)]
- A requirement that the plantiff expect reimbursement at the time the necessaries are provided [Re Altmann's Will, 149 Misc. 115, 266 NYS 773 (1933)]
- A requirement that the plaintiff show that the absent parent had the financial ability to pay during the period for which reimbursement is sought [Holt v. Holt, 42 Ark. 495 (1983)]
- A requirement that the fault of the separation not be the custodial parent's. [State ex rel. Division of Family Services v. Standridge, 676 SW2d 513 (Mo. 1984).]

One other potential problem concerns the issue of the custodial relative's portion of the public assistance grant in those States that consider the needs of the custodial relative in the AFDC budgeting process. If the absent parent owes no duty of support to the custodial relative, it is arguable whether the absent parent has an obligation to repay the entire amount of public assistance. The counterargument here is that the eligibility for public assistance is based on the children. Taking into account the needs of the custodial relative, and balancing those needs against the income of the custodial parent, the State simply is adjusting the amount to be paid to the children according to the financial situation of the custodial parent. A court uses the same process to fashion a current support amount. The amount of the public assistance grant which is attributable to the needs of the custodial relative, when reviewed in this light, is no more for the custodial parent than would be the analogous portion of a judicial order for current support.

The common law reimbursement for necessaries remedy still exists in a majority of American jurisdictions. It can increase the effectiveness of the IV-D Program by allowing the State or local jurisdiction to recover child support from a parent for a period of time in the past during which no support order was in effect. Also, it can increase the bargaining position of the IV-D agency when negotiating the establishment of a current support obligation. A sample Petition for Reimbursement of Necessaries appears in the appendix to this chapter as Exhibit 5.3.

TEMPORARY ORDERS

Generally, temporary orders are appropriate for only a small portion of the IV-D agency's caseload. Temporary orders occasionally can help expedite a divorce action. In such cases, an absent parent who has been contesting the action to avoid support payments loses any advantage he or she may have gained through delay. Temporary support orders also are important for securing current support when the State is expending money for the child(ren) and the divorce action is likely to be lengthy. Once the temporary order is established, it is subject to all appropriate enforcement remedies.

A motion for temporary orders will come before a judge in one of two ways. Either the client's attorney will so move or the IV-D attorney will intervene in the divorce action by filing a petition for temporary support. When intervening in a divorce, the IV-D attorney will participate only in setting the amount of child support.

In setting support for the temporary order, the judge is required to consider all relevant factors in the same manner as for a "permanent" support order. The absent parent's attorney may raise issues of temporary custody and visitation.[18] However, these issues should not be relevant to the support action. The IV-D attorney should stress the limited purpose of the order, the child's best interest, and the interest of the State.

One problem that can arise in pursuing temporary orders involves the unrepresented AFDC recipient who is being divorced by an absent parent. The IV-D attorney should make it clear to the recipient, to the absent parent's attorney, and to the court, that the IV-D attorney does not represent the recipient's interest in the divorce action. The AFDC recipient should be counseled to seek representation in the divorce action from legal services or the private bar.

Under an equal protection argument, several States have begun to issue temporary support orders in paternity cases. Because the amount of the temporary order is often higher than the final order, this action often encourages early resolution. Temporary support in paternity cases is discussed in Chapter 10 of this Handbook.

It should be noted that the common law reimbursement for necessaries action, discussed above, also is available as an option to reimburse the State for monies paid out in AFDC for children for whom there was no established support order.

DEFENSES TO ESTABLISHMENT

This section surveys a limited number of defenses that absent parents submit in establishment proceedings. Enforcement defenses are covered in Chapter 7. Defenses peculiar to interstate cases are treated in Chapter 9.

Bad Faith Nonpaternity Defenses

On occasion, fathers of children who were born during their marriage to the mother will submit a defense of nonpaternity for the purpose of gaining a negotiation advantage or making the proceeding as cumbersome as possible in the hopes that the IV-D agency will drop the action. There are several rules of law which can be used to defeat such an attempt.

Presumption of paternity. Where the child was conceived or born during the marriage, or during a marriage which was attempted but failed for technical reasons, the child normally is presumed to be the legitimate issue of the husband. "In the interest of stabilizing family relationships, there is a universal, worldwide acceptance of a strong presumption of legitimacy in favor of children born in wedlock."[19] The extent to which the presumption is rebuttable varies from jurisdiction to jurisdiction, and it is almost impossible for the father to raise in jurisdictions that still recognize Lord Mansfield's Rule to prohibit a parent from giving testimony to bastardize a child born during the marriage.[20] In other jurisdictions, the presumption is rebuttable, but the party attacking the presumption generally has a difficult burden of proof to overcome. [See, for example, A.G. v. S.G., 199 Colo. 403, 609 P2d 121 (1980); Gross v. Vanlerberg, 7 Kan.App.2d 99, 638 P2d 365 reviewed 646 P2d 477 (1981); Smith v. Casey 198 Colo. 433, 601 P2d 632, (1979).]

Legitimation by marriage. Even where the child was not born or conceived during the absent parent's marriage to the mother, if a marriage follows the child's birth and the father acknowledges his paternity in writing, many States treat that child, for all purposes, as though it was born of the marriage. [See Mixon v. Mize, 198 So2d 373 (Fla.App. 1967); Commonwealth v. Roznski, 206 Pa.Super. 397, 213 A2d 155 (1965); Missouri Family Law, Third Edition, The Missouri Bar (1982), sec. 18.50.] A State's probate code often treats this topic.

Equitable estoppel or adoption. Even where the father never made an acknowledgment specific enough to bring into play one of the above, the father may be estopped from denying paternity where he has held the child out to the community as his, and the child has relied on this implied acknowledgment. [See Watts v. Watts, 115 N.H. 186, 337 A2d 350 (1975); Drake v. Drake, 43 SW2d 556 (Mo. 1931); Missouri Family Law, Third Edition, The Missouri Bar (1982), sec. 18.51.]

The Runaway Child

The obligated parent may argue that when he or she is willing to provide a home for the child and the child voluntarily leaves that home, the parent should not be made to pay support. Nevertheless, these circumstances do not absolve the responsible parent of his or her legal obligation to pay child support. However, a noteworthy exception is when a court orders that the child shall not leave home without permission of the court. This is a common provision in many divorce decrees.[21]

In the case of Virgil v. Virgil, 494 P2d 809 (Colo. 1972), the fact that the mother had removed the children from Colorado without the father's consent did not relieve the father of his duty to support the children. Other cases hold that a parent may be found criminally responsible for his or her failure to support his or her child, even though the child is living apart from the parent without the parent's consent. [Bennefield v. State, 4 SE 869 (Ga. 1888); Moore v. State, 57 SE 1016 (Ga. 1907); Commonwealth v. Donovan, 220 SW 1081 (Ky. 1920); State v. Sutcliffe, 25 A 654 (R.I. 1892); Beilfuss v. State, 126 NW 33 (Wis. 1910); and Bowen v. State, 46 NE 708 (Ohio 1897).]

Release Agreements

Generally, an agreement between the parents of a child made outside the courtroom which absolves the noncustodial parent's support obligation is invalid.[22] [In re Marriage of Goodrich, 622 SW2d 411, 413 (Mo.App. 1981); Storey v. Ward, 258 Ark. 24, 523 SW2d 387 (1975); Elkind v. Byck, 67 Cal. Rptr. 404, 439 P2d 316 (1968); Barnett v. Barnett, 243 A2d 51 (D.C.App. 1968).]

Most courts hold that parents cannot bargain away the children's right to continuing support in accordance with their needs and the parent's ability to provide support. This is true even where the agreement is contained in a previous settlement which was incorporated in to a divorce decree. [Williams v. Williams, 542 SW2d 563, 566 (Mo.App. 1976); Hart v. Hart, 539 SW2d 679, 682 (Mo.App. 1976); Keyes v. Keyes, 9 P2d 804 (Idaho 1932).] However, in some jurisdictions, the custodial parent can release his or her title to both past and future support but cannot release support belonging to the children. [Ruehle v. Ruehle, 74 NW2d 689 (Neb. 1956).]

MODIFICATIONS

Many child support orders have been rendered insufficient by the passage of time and the effects of inflation.[23] Others no longer correspond to the real ability of the absent parent to pay support. The authority of the court to modify child support obligations has been addressed in several decisions, universally affirming the discretion of the court to modify its own orders. The Child Support Enforcement Amendments of 1984 require as well that every issued or modified order include a provision for mandatory wage withholding. [45 CFR 303.100; 42 USC 666(a)(1). See also the discussion of income withholding in Chapter 6.] In addition, it is now mandatory to include medical support coverage in all new or modified support orders when it is available. [45 CFR 306.51(b)(1); 42 USC 652(f).]

Jurisdiction

The authority to modify child support orders usually is based on the continuing jurisdiction of a trial court over the order: "a decree of child support is always modifiable." [Ill.Rev.Stat. 1979, ch. 40 par. 510.] Moreover, a trial court generally has "inherent jurisdiction to consider future child support in a dissolution proceeding and need not expressly retain jurisdiction." [In re Marriage of Petramale, 58 Ill.Dec. 537, 1021 Ill.App. 1049, 430 NE2d 569 (1981).] This is true even where the absent parent no longer resides in the jurisdiction. [See Carlin v. Carlin, 620 Or.App. 350, 660 P2d 204 (1983), citing cases from Arizona, Arkansas, Colorado, Illinois, Louisiana, Maryland, Minnesota, Mississippi, New Hampshire, Ohio, and West Virginia.]

As a general rule, all orders are subject to modification, at least as the order applies to the future. Even where an agreement intended to be determinative was entered and incorporated into the final decree, the Supreme Court of Indiana held that this did not prevent modification, stating:

> . . . the fact that a child support order has been entered pursuant to the terms of a settlement agreement, even where, as here, it is intended as forever determinative by the parties, is of no consequence to the question whether the order should subsequently be modified. [Meehan v. Meehan, 425 NE2d 157 (Ind. 1981). See also Burks v. Burks, 427 NE2d 353 (Ill.App.Ct. 1981); Lacassagne v. Lacassagne, 430 So2d 818 (La.App. 5 Cir. 1983).]

Criteria

The general requirement for modifying orders is "changed circumstances so substantial and continuing as to make the terms [of the original order] unconscionable."

[Uniform Marriage and Divorce Act, Sec. 316(a).] The petitioner requesting modification is responsible for proving such a change in circumstances. [In re Marriage of Roth, 55 Ill.Dec. 271, 99 Ill.App.3d, 426 NE2d 246 (1981).] In determining whether or not such a change has occurred, the relevant times are the date of the decree or the time of the last prior modification and the time of petition for modification. [Strauss v. Strauss, 619 SW2d 18 (Tex.Civ.App. 1981).]

Courts have reached various decisions about what constitutes a substantial and continuing change in circumstances. The major elements that have been used to differentiate such circumstances have been: which parties to the order are affected; what kinds of change qualify as substantial and continuing; and which standards can be used to evaluate the current order?

Many jurisdictions have found sufficient justification for modification in a substantial change in the absent parent's financial position since the date of the current order.

> Our question, then, is whether a material and substantial change in both circumstances, the ability of the parent to contribute and the needs of the child, must be shown, or whether a material and substantial change in only one of the circumstances, the ability of the parent to contribute, is sufficient to justify modifying an order providing for the support of a child. We hold that a material and substantial change in only one circumstance, the ability of the parent to contribute, is sufficient to justify modifying an order providing for the support of a child. [Holt v. Holt, 620 SW2d 650 (Tex.Civ.App. 1981).]

Other courts have held that an increase in the father's ability to pay is insufficient alone to justify modification. [In re Marriage of Hughes, 635 P2d 933 (Colo.App. 1981).] These courts have held that it is necessary to show not only that the absent parent's situation has changed but also that the needs of the children have changed: "the parent, in seeking an increase, has a twofold burden--he or she must prove (a) the children's need for additional support and (b) the other parent's ability to pay more than the amount that was originally fixed in the order presently under review." [Bates v. Bates, 440 A2d 724 (R.I. 1982). (Emphasis added.)] To meet such a burden, it is often necessary to prove the needs of the children and financial situations of the parents at both relevant times. [Flynn v. Flynn, 433 So2d 1037 (Fla.App.4th Dist. 1983).]

Generally, to justify a modification, the change in circumstances must be something that the court has not and could not have anticipated. [Bilosz v. Bilosz, 441 A2d 59 (Conn. 1981).] This sometimes is based explicitly on the interpretation of the order and the principle of res judicata, which prohibits the relitigation of issues already decided. A Maryland court of appeals explains:

> Any issue that was litigated or could have been litigated in the divorce proceeding may not be relitigated in a subsequent petition to modify the support. The basis of a petition to modify child support may only be an issue that was not and could not have been raised earlier, viz., a change in the circumstances of the parties. [Reese v. Huebschman, 50 Md.App. 709, 440 A2d 1109, 1111 (1982).]

What constitutes a change in circumstances sufficient to modify the order depends on the State. Colorado seems to lay the heaviest burden on the movant, i.e., to show that the order currently in effect is "unconscionable." [In re Marriage of Anderson, 638 P2d 82 (Colo.App. 1981); In re Marriage of Hughes, supra.] Alaska has accepted the lightest criteria, that "there was a 'change' in the sense that there may have been a mistake in the assumption made when the decree was entered" and "that lack of sufficient funds to permit the custodial parent to do an adequate and reasonable job in providing for the best interests and welfare of the children was something which was both material and substantial." [Headlough v. Headlough, 639 P2d 1010, 1013 (Alaska, 1982).]

Most other courts have adopted a middle position on the issue, although the discretion allowed the trial court may lean toward one of the positions described above. For instance, a Missouri appellate court found that there was no abuse of discretion in failure to modify in the absence of evidence that the order was unreasonable. [Henderson v. Henderson, 622 SW2d 7 (Mo.App. 1981).] Generally, there is a heavier duty involved in establishing the need for modification if the obligation results from a voluntary agreement incorporated into the decree. [Reese v. Huebschman, supra; Bish v. Bish, 404 So2d 840 (Fla.App. 1981).]

Several other criteria for modifications also have been addressed. A common concern is the extent to which the court may take the passage of time, in itself, as constituting a change in circumstances. Williamson v. Chapell, 408 So2d 134 (Ala.Civ.App. 1981), holds that the effects of inflation and increased needs of the children because of increased age justify an upward modification. [C. Vinson v. Vinson, 628 SW2d 376 (Mo.App. 1982).] On the other hand, a Colorado court has held that, although inflation is a factor properly to be considered in the modification of an order, the specific effects of inflation on the needs of the child must be shown. [In re Marriage of Hughes, supra; Carpenter v. White, 624 SW2d 618 (Tex.App. 1981).] The increased age of the children is not, in itself, sufficient to justify modification.

Other courts have held that something beyond the mere passage of time is required, although the discretion of the trial judge in specific cases is usually granted deference. However, an evidentiary hearing invariably is required before deciding that a modification is in order. [In re Marriage of Smith, 641 P2d 301 (Colo.App. 1981). (Trial court erred in reversing master without evidentiary hearing.)]

A modification proceeding is a two-step process. First, the court determines whether a modification is appropriate, as discussed above. Next, the amount of the new obligation is determined. [Brothers v. Vickers, 406 So2d 955 (Ala.Civ.App. 1981).]

The criteria for determining the amount of the new obligation have been held to be generally the same as those which governed the establishment of the initial order.

> Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . These require the court to consider, without limitation, the needs and financial resources of each of the parties and their children, as well as such factors as health, age, and station in life. [Hardisty v. Hardisty, 439 A2d 307, 311 (Conn. 1981). (See, however, In re Marriage of Anderson, supra).]

Other issues relevant to the modification of an initial order include the obligations incurred by the absent parent toward a second family and whether earnings capacity, as distinct from actual earnings, is to be considered. Most courts explicitly consider the responsibilities toward a second family in assessing ability to pay increased child support, although these do not justify failure to provide adequately for the first family.

> Further, the subsequent remarriage of a divorced husband, as his own voluntary act, is not of itself a circumstance which justifies a [downward] revision of maintenance . . . While children of a second marriage can be a consideration in revising maintenance payments, we cannot unreasonably curtail or ignore the necessities or wants of the first wife and child. [Vyskocil v. Vyskocil, 54 Ill.Dec. 873, 99 Ill.App. 391, 425 NE2d 1090, 1093 (1981).]

Similarly, in Openshaw v. Openshaw, 639 P2d 177 (Utah 1981), the Utah Supreme Court held that an absent parent's support of step-children is a factor to be considered during a modification proceeding.

The effect of a substantial decrease in an obligor's ability to pay depends on the extent, nature, and cause of the decrease. Unemployment, or other financial downturn, does not entitle an obligor to a automatic downward modification. [Morisch v. Morisch,--- NW2d ---, 10 FLR 1697 (Neb. 1984).] This is particularly true if the decrease in ability to pay results from the obligor's voluntary acts. He or she may not escape responsibility by voluntarily declining to work [Boyer v. Boyer, 567 SW2d 749 (Mo.App. 1978)], by deliberately limiting his work to reduce his income [Butler v. Butler, 562 SW2d 685 (Mo.App. 1977)], or by losing a job because of his criminal behavior [Noddin v. Noddin, 455 A2d 1051 (N.H. 1983)]. In these circumstances, most courts will consider the obligor's earnings potential to determine whether a modification is warranted. [Bilosz v. Bilosz, supra; Johnson v. Johnson, 441 A2d 578.]

Automatic Modifications

Attorneys and judges recently have begun to try to craft support orders that automatically adjust to changes in the parties' relative financial conditions, and for increases in the needs of the children that so often accompany their growing older.[24] These attempts have taken two forms: (1) orders that are based on a percentage of the obligor's income and (2) orders that self-adjust based on changes in the Consumer Price Index (CPI) or some other measure of changes in living expenses.

Percentage of income orders have not found favor in appellate courts due to their reliance on tax returns, pay stubs, or other poor reflections of the obligor's income, and because they do not account for other relevant changes, such as the needs of the children or the custodial parent's financial situation. [Lewis v. Lewis, 450 So2d 1123 (Fla.Dist.Ct.App. 1984); In re Meeker, 272 NW2d 455 (Iowa 1978); DiTolvo v. DiTolvo, 131 N.J. Super. 72, 328 A2d 625 (1974); Breiner v. Breiner, 195 Neb. 143, 236 NW2d 846 (1975); Stanaway v. Stanaway, 70 Mich.App. 294, 245 NW2d 723 (1976). Contra, see Edwards v. Edwards, 99 Wash.2d 913, 665 P2d 883 (1983); and Heinze v. Heinze, 444 A2d 559 (N.H. 1982).]

Orders that base the automatic adjustments on various factors, not merely the absent parent's income, have fared better. Courts in several States have upheld orders providing for adjustments based on changes in the CPI. [Branstad v. Branstad, 400 NE2d 167 (Ind.App. 1980); In re Marriage of Stamp, 300 NW2d 275 (Iowa 1981); Orman v. Orman, 344 NW2d 415 (Minn. 1984).] These decisions have noted that changes in the CPI provide a better measure of changes in the financial situation of all the parties to the action, that the CPI provides a readily ascertainable objective measure, and that such an approach enhances judicial economy.

One major problem with both approaches occurs in States that automatically grant an unpaid support payment the status of a judgment when its due date passes. Automatic judgment status, discussed in Chapter 6, allows execution to issue without a hearing. (The theory is that the amount of the judgment is readily ascertainable from the face of the support order, and thus a hearing would serve no useful purpose.) Clearly, automatic judgments and escalator clauses are theoretically and practically incompatible.

FOOTNOTES

/1/ 401 FLR 001 et seq.

/2/ See White and Stone, "A Study of Alimony and Child Support Rulings With Some Recommendations," 10 Fam.L.Q. 75 (1976); "What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court," 57 Den.L.J. 21 (1979).

/3/ For an example of a regulation promulgated by a State IV-D Agency to comply with the Federal mandate, see Missouri's 13 CSR 40-20.010 (1982).

/4/ Texas State Bar Report, Family Law, 1984 Special Child Support and Visitation Issue.

/5/ Franks, "How to Calculate Child Support," 86 Case & Comment 3 (1981); "Summing Up Child Support: A New Formula," 7 Dist. Law 28 (July/August 1983). See also Polikoff, "The Inequity of the Maurice Franks' Custody Formula," 8 Dist. Law 14 (Nov./Dec. 1983).

/6/ Cassetty and Douthitt derive this need figure from an estimate made by economist Philip Eden and published in Estimating Child and Spousal Support: Economic Guidelines for Judges and Attorneys (Western Book Journal Press: San Mateo, CA, 1977).

/7/ Ill. Pub. Act 83-1404, 1984 Regular Session.

/8/ The passage of a percentage guideline statute may support an argument that the court may no longer impute income to the obligor based on ability to earn.

/9/ See Footnote 11, supra.

/10/ Cassetty and Douthitt recognize that allowing the custodial parent a share of the surplus income could be viewed as an implicit form of alimony, but point out that any other method would require the deletion of the custodial parent's income from the numerator. Doing so would defeat the income-sharing aspect of the approach and ignore the economic realities of the situation. Id., p.12.

/11/ The most extensive use of an income-sharing approach has been tried in the State of Delaware, which employs the Melson Formula. It is beyond the scope of this Handbook to explain the many variations of the Melson Forumla. For a detailed explanation see "Delaware Child Support Formula," Family Court of the State of Delaware, July 1984. (Available from the National Reference Center of the Office of Child Support Enforcement, Rockville, MD.)

/12/ H.R. Rep. No. 925, 98th Cong., 2d Sess. 29 (1984).

/13/ See, e.g., Missouri Revised Statutes sec. 454.465 (Supp. 1984); Virginia Code sec. 63.1-251 (1981).

/14/ California Welfare and Institutions Code sec. 11350; K.S.A. 39-718a; Texas Family Code, Title 1 sec. 4.02.

/15/ Helmholz, "Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law," 63 Va.L.Rev. 431, 437 (1977).

/16/ See, e.g., Serbian v. Alpern, 284 Md. 680, 399 A2d 267 (1979).

/17/ Greenspan, supra, p. 392.

/18/ For information on custody and visitation, see the ABA monograph by Robert Horowitz and G. Diane Dodson, Child Support, Custody and Visitation: A Report to State Child Support Commissioners (Washington, DC: National Legal Resource Center for Child Advocacy and Protection, Child Support Project, July 1985).

/19/ Krause, "Creation of Relationships of Kinship," 4 Int. Encyc. of Comp. Law 14.21 (1976).

/20/ Krause, Child Support in America: The Legal Perspective (Charlottesville, Virginia: Michie & Co., 1981), pp. 104-110; Uniform Parentage Act, 9A U.L.A. sec. 4.

/21/ This section is adapted from Chester H. Adams et al., A Guide for Judges in Child Support Enforcement, (Chevy Chase, MD: National Institute for Child Support Enforcement and National Council of Juvenile and Family Court Judges, 1982), pp. 104-105.

/22/ Id., pp. 103-104. For a more detailed discussion of release agreements, see Chapter 7, infra.

/23/ This section is adapted from B. Keith, "Modifications of Child Support Orders," Parts I and II, Child Support Report, Vol. IV, Nos. 10 and 11 (Rockville, MD: Office of Child Support Enforcement, Oct./Nov. 1982).

/24/ This section is adapted from G. Martin, "Escalator Clauses in Support Decrees: An Overview of Recent Decisions," Child Support Report, Vol. VI, No. 11 (Rockville, MD: Office of Child Support Enforcement, Nov. 1984).

EXHIBIT 5.1

IN THE CIRCUIT COURT OF __________ COUNTY
STATE OF __________

______________________________________,)
Plaintiff,)
)
vs.)
______________________________________,)
Defendant.)

Case No. ________

PETITION FOR SUPPORT

The Plaintiff, being duly sworn, states as follows:

1. Plaintiff has been a resident of __________ County, __________, continuously since _____.

2. Plaintiff and defendant were married on the _____ day of _____________, 19____, in ______________, ______.

3. The following children were born of that marriage:

Name	Age	Birthdate	Birthplace

4. The parties have been living separate and apart since ________________.

5. The plaintiff is the mother of said children and has provided reasonable and necessary expenses for the care and maintenance of the minor child(ren) since _____________________, in the amount of $_________.

6. Defendant is an able-bodied man who is gainfully employed as a _____________ and is earning a salary.

7. Defendant has refused to contribute any amount to plaintiff for the support of the above-named children.

8. _______ hundred dollars ($_____) per month per child or a total of ________ hundred dollars ($____) per month is a reasonable amount for defendant to contribute for the support of his child(ren).

WHEREFORE, the plaintiff prays for this court to enter an order granting the following relief:

1. That defendant be ordered to provide ____ hundred dollars ($_____) per month, for the support of the above-named child(ren) until they reach the age of majority or otherwise become emancipated.

2. Plaintiff be awarded a judgment in the amount of $____________________ for the past expenses in rearing the child(ren).

3. For such other relief as the Court deems just.

____
DISTRICT ATTORNEY

____
BY ASSISTANT DISTRICT ATTORNEY
ATTORNEY FOR PLAINTIFF

VERIFICATION

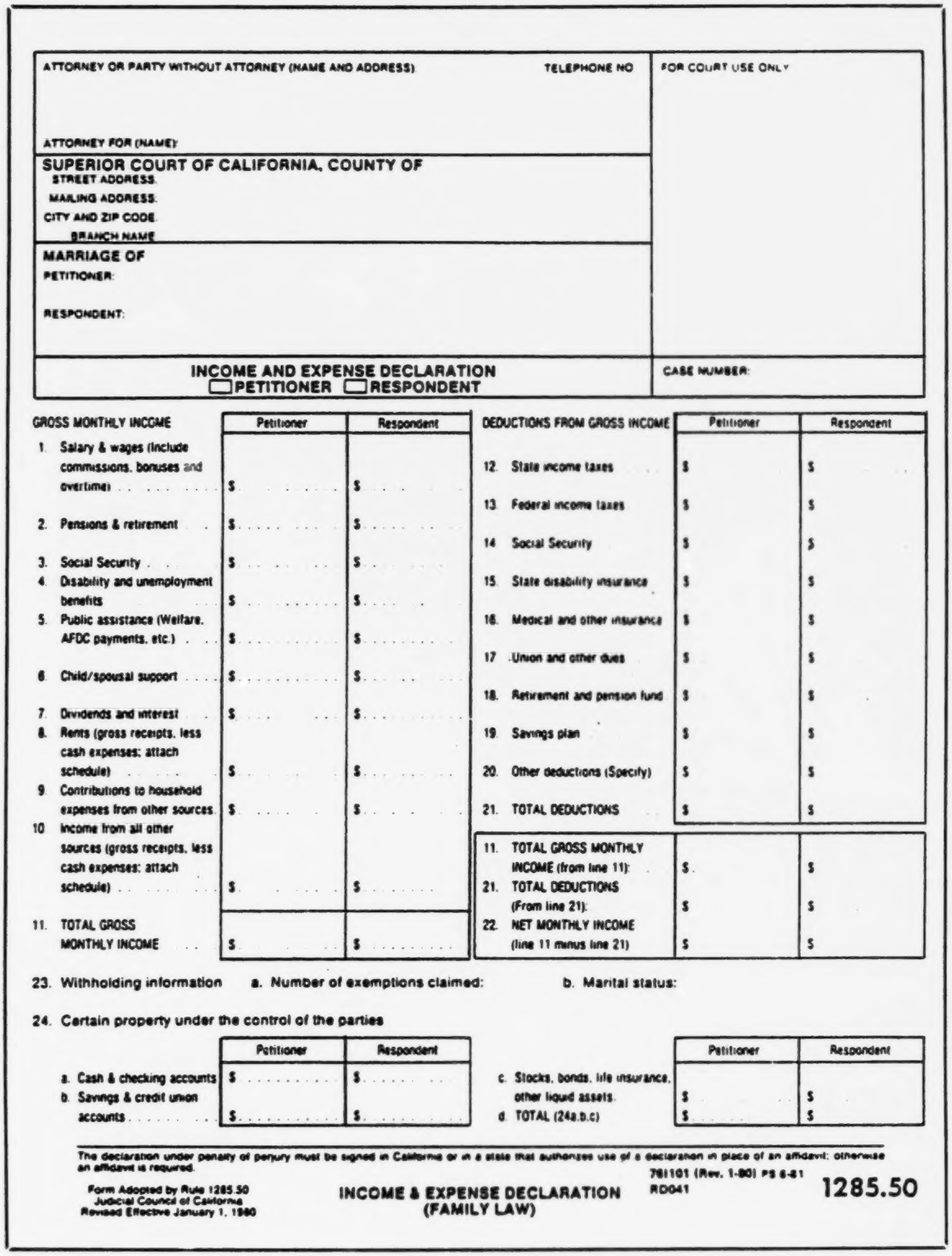
Plaintiff, being duly sworn, says that this complaint is true to the plaintiff's own knowledge, except as to matters stated on information and belief, and as to those matters, plaintiff believes them to be true.

____
PLAINTIFF

Sworn to and subscribed before me on this _____ day of _________, 19___.

____
Notary Public
My commission expires _________________.

Exhibit 5-2*
Income and Expense Declaration



ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS) TELEPHONE NO ATTORNEY FOR (NAME):	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
MARRIAGE OF PETITIONER: RESPONDENT:	
INCOME AND EXPENSE DECLARATION ☐ PETITIONER ☐ RESPONDENT	CASE NUMBER:

GROSS MONTHLY INCOME	Petitioner	Respondent
1. Salary & wages (include commissions, bonuses and overtime)	$	$
2. Pensions & retirement	$	$
3. Social Security	$	$
4. Disability and unemployment benefits	$	$
5. Public assistance (Welfare, AFDC payments, etc.)	$	$
6. Child/spousal support	$	$
7. Dividends and interest	$	$
8. Rents (gross receipts, less cash expenses; attach schedule)	$	$
9. Contributions to household expenses from other sources	$	$
10. Income from all other sources (gross receipts, less cash expenses; attach schedule)	$	$
11. TOTAL GROSS MONTHLY INCOME	$	$

DEDUCTIONS FROM GROSS INCOME	Petitioner	Respondent
12. State income taxes	$	$
13. Federal income taxes	$	$
14. Social Security	$	$
15. State disability insurance	$	$
16. Medical and other insurance	$	$
17. Union and other dues	$	$
18. Retirement and pension fund	$	$
19. Savings plan	$	$
20. Other deductions (Specify)	$	$
21. TOTAL DEDUCTIONS	$	$

11. TOTAL GROSS MONTHLY INCOME (from line 11):	$	$
21. TOTAL DEDUCTIONS (From line 21):	$	$
22. NET MONTHLY INCOME (line 11 minus line 21)	$	$

23. Withholding information a. Number of exemptions claimed: b. Marital status:

24. Certain property under the control of the parties

	Petitioner	Respondent
a. Cash & checking accounts	$	$
b. Savings & credit union accounts	$	$

	Petitioner	Respondent
c. Stocks, bonds, life insurance, other liquid assets.	$	$
d. TOTAL (24a,b,c)	$	$

The declaration under penalty of perjury must be signed in California or in a state that authorizes use of a declaration in place of an affidavit; otherwise an affidavit is required.

Form Adopted by Rule 1285.50
Judicial Council of California
Revised Effective January 1, 1980

INCOME & EXPENSE DECLARATION
(FAMILY LAW)

761101 (Rev. 1-80) PS 6-81
RD041

1285.50

*Source: Los Angeles, California, County Family Support Representative Establishment Training Manual, Vol. III, pp. 14-47.

25. List the name, age, and relationship of all members of the household whose expenses are included below

MONTHLY EXPENSES	Petitioner	Respondent
26. Residence payments		
a. Rent or mortgage	$	$
b. Taxes & insurance	$	$
c. Maintenance	$	$
27. Food & household supplies	$	$
28. Utilities & telephone	$	$
29. Laundry & cleaning	$	$
30. Clothing	$	$
31. Medical & dental	$	$
32. Insurance (life, health accident, etc.)	$	$
33. Child care	$	$

	Petitioner	Respondent
34. Child/spousal support (prior marriage)	$	$
35. School	$	$
36. Entertainment	$	$
37. Incidentals	$	$
38. Transportation & auto expenses (insurance, gas, oil, repair)	$	$
39. Installment payments (insert total and itemize below at 42)	$	$
40. Other: (specify)	$	$
41. TOTAL MONTHLY EXPENSES	$	$

42. ITEMIZATION OF INSTALLMENT PAYMENTS OR OTHER DEBTS ☐ Continued on attachment 42.

CREDITOR'S NAME	FOR	MONTHLY PAYMENT	BALANCE
		$	$

43. ☐ ATTORNEY FEES HAVE BEEN REQUESTED.

a. I have paid my attorney for fees and costs the sum of $ b. My arrangement for attorney fees and costs is:

(Print or type name of Attorney) (Signature of Attorney)

I declare under penalty of perjury that the foregoing, including any attachment, is true and correct and that this declaration is executed at (place): , California, on (date):

(Print or type name of Declarant) (Signature of Declarant)

EXHIBIT 5.3*

IN THE CIRCUIT COURT OF __________ COUNTY
STATE OF __________

State of __________ ex rel.)
(IV-D Agency))
____________________________, Plaintiff,)
) Case No. _______
)
vs.) PETITION FOR REIMBURSEMENT
) OF NECESSARIES
)
____________________________, Defendant.)

1. Comes now Plaintiff and states: that plaintiff is an executive agency of the State of __________, authorized by ________ to administer the State Aid for Families with Dependent Children (AFDC) Program, and by ________ to establish and enforce support obligations owing to dependent children.

2. That defendant currently resides at ____________________________________.

3. That __________ is the mother and defendant is the father of the following minor child(ren):

Name	Age	Birthdate	Birthplace

4. That the above-named mother and child(ren) were eligible for and received public assistance from plaintiff in order to provide necessary support for the same above-mentioned child(ren), for a period beginning _____________, 19 ___, and ending _________________, 19___.

5. On __________, 19___, ________________________, the mother of the aforementioned child(ren), assigned to plaintiff any and all rights to support for the aforementioned child(ren), which assignment is attached, incorporated into, and hereby made a part of this petition.

6. This assignment remained in effect for the period beginning ____________, 19___, and ending ______________________, 19___, so that all support rightfully due from defendant during said period was and is assigned to plaintiff.

7. That during the period beginning __________, 19____, and ending _________, 19___, defendant failed to provide fair and reasonable support for the above-named child(ren) according to their needs.

*Source: Missouri Prosecutor's Deskbook, Form 43-15.

8. That the amount paid by plaintiff to defendant's child(ren) from ________, 19__, to __________, 19___, is $__________, and that this represents a fair and reasonable amount necessary to provide for the support of the aforementioned minor child(ren).

WHEREFORE, plaintiff prays for an order directing defendant to pay to plaintiff the sum of $_________ to reimburse plaintiff for necessaries of support provided by plaintiff during the period _______________, 19___, to _______________, 19___, and for costs of this action and such other relief as this court deems fit.

____
District Attorney

____
By Assistant District Attorney
Attorney for Plaintiff

CHAPTER 6

Enforcing Child Support Obligations

INTRODUCTION

Since 1975, Federal regulations have required each State IV-D agency to employ contempt proceedings, garnishments, executions on real and personal property, and other remedies when appropriate. [45 CFR 303.6.] The Child Support Enforcement Amendments of 1984 expand the list of remedies that must be made available to and used by State IV-D agencies. This chapter surveys the enforcement remedies available to the child support attorney in most jurisdictions. The goal of each section is to explain the remedy, identify legal and practical concerns for each remedy, and report relevant case law from across the county. Sample forms for the more frequently used remedies appear in the appendix at the end of this chapter. In addition, the mandatory practices called for by the Child Support Enforcement Amendments of 1984 are discussed in depth.

The remedies are not sequenced in order of importance or usefulness, except for the placement of income withholding at the outset of the chapter. If income withholding is not possible for an individual case, for example, if the absent parent is unemployed, the child support attorney should assess the appropriateness of other remedies. Program attorneys must refrain from always using the same remedy (e.g., contempt) regardless of the facts of the case. The Child Support Enforcement Amendments of 1984 require that States develop and implement guidelines for determining whether tax refunds should be intercepted, real and personal property liens should be imposed, security should be required, or information should be provided to consumer reporting agencies in a given case. [42 USC 666(a).] Child support attorneys should develop similar guidelines for use with other available remedies as well.

In addition to income withholding, this chapter covers judgments, liens against real and personal property, levy and execution, garnishment, civil contempt, criminal contempt, criminal nonsupport, interception of Federal and State tax refunds, bonds and other forms of security, equitable remedies, reports to consumer reporting agencies, full collection services by the Internal Revenue Service (IRS), mandatory military allotments, and statutory examination of a judgment debtor.

INCOME WITHHOLDING

Child support obligations have been enforced with various forms of income withholding throughout most of our Nation's history. Over the years, many States have used wage garnishments effectively. However, even where garnishment procedures are summary and wage exemptions are limited the temporary nature of the garnishment remedy is often unsatisfactory. In the 1970s, many States enacted statutes authorizing an employer to withhold a portion of an obligor's paycheck each pay period and send it to the court that entered the order or directly to the family. Early versions of these statutes merely recognized the validity of voluntary wage assignments, and required employers to honor such assignments. As child support enforcement experts employed the concept more frequently, State legislatures began to enact statutes that authorized courts to order obligors to make wage assignments. Most often, judges would order an involuntary wage assignment as a condition of purgation after finding the obligor to be in contempt for failure to comply with the support order. This proved to be such an effective remedy that many State legislatures revised their statutes to expand the definition of wage to include other forms of income and to require judges to order involuntary wage assignments in certain circumstances.

Wage and income withholding is a superior enforcement mechanism because it extends into the future. It also allows for arrearages (as well as current support) to be collected in installments that do not preclude the obligor from meeting his or her minimum financial requirements.

In 1984, Congress recognized the efficacy of income withholding by enacting 42 USC 666(a)(1) and (b), which require States to enact statutes that provide for mandatory income withholding in most IV-D cases where the obligor is in arrears and his or her employer has been identified. The new Federal statute is very specific, both substantively and procedurally, in order to assure that State legislatures enact income withholding provisions that are effective, efficient, and that fully protect the rights of all affected parties. The requirements are based on the collective experience of the States that have enacted and implemented large-scale income withholding provisions.

The Federal statute requires that, effective October 1, 1985, income withholding be the preferred remedy. After that date, "all child support orders which are issued or modified in the State will include a provision for withholding from wages, in order to assure that withholding as a means of collecting child support is available if arrearages occur without necessity of filing application" with the State child support enforcement agency.[1] Clearly, this requirement applies to all support orders that are established in the State, regardless of the nature of the proceeding (i.e., divorce, separate maintenance, paternity, adult abuse, Uniform Reciprocal Enforcement of Support Act, etc.) and regardless of who brings the action. This provision was intended to permit someone other than the IV-D agency to initiate wage withholding (e.g., a private attorney or a custodial parent, pro se) and to make effecting the withholding easier for new IV-D cases in which an order already exists. A few States have gained special exemption from immediately effecting wage withholding procedures.

Most existing statutes that contain such a requirement call for a conditional withholding provision to be included in the support order itself. Such a provision fulfills a dual function. First, it encourages the obligor to comply with the support order voluntarily. Second, it informs the obligor regarding the consequences of noncompliance in advance, thus lessening the degree of notice to which he or she may be constitutionally guaranteed at the time when the withholding is initiated.

In addition to requiring that a provision be included in every new or modified order, the Federal statute requires that income withholding be effected in every case worked by the IV-D agency in which an appropriate delinquency occurs.[2] The statute allows the State some flexibility in determining what the "triggering event" will be, but State law must provide for withholding no later than the "date on which the payments which the absent parent has failed to make under such order are at least equal to the support payable for one month."[3] The absent parent may request that the withholding begin at an earlier date.

The Act requires that the withholding occur "without the need for any amendment to the support order involved or for any further action (other than those actions required under this part) by the court or other entity which entered such order."[4] "Actions required under this part" refers only to providing notice, resolving contested cases, distributing collections, and terminating withholdings. This provision was apparently intended to remove all discretion from the court or agency administering the withholding procedure as to whether withholding should occur in a case, and to prevent State law from requiring a hearing in all cases.[5]

The Federal statute allows State due process requirements to dictate the extent of the notice to be provided to the obligor after the triggering event occurs; the statute requires that notice be given on the triggering date. As a general rule, the absent parent will be entitled to an advance notice regarding the alleged delinquency and the withholding procedure. The notice, where required, must inform the absent parent:

- Of the amount of overdue support owed
- Of the amount that will be withheld
- That the withholding applies to any current or subsequent period of employment
- Of the procedures available for contesting the withholding and that the only basis for contesting the withholding is a mistake of fact
- Of the period within which the absent parent must contact the State in order to contest the withholding and that failure to contact the State within the specified time limit will result in the State notifying the employer to begin withholding
- Of the actions the State will take if the absent parent contests the withholding, including the procedure to resolve such contests.[6]

The requirement of advance notice does not apply to States that had a withholding system in effect on August 16, 1984, providing for other, and presumably lesser, forms of notice. For instance, the wage withholding statutes in effect in Missouri[7] and California[8] on that date provide for notice to the employer, who is to notify the absent parent and continue to hold the portion of his or her wages until a hearing is held and a resolution is achieved.

At the hearing, the only ground on which the absent parent may contest the withholding is "mistake of fact." The Act does not define mistake of fact, but the report issued by the House Ways and Means Committee indicates that this was meant to be a very restrictive concept:

> Such mistakes of fact would include, for example, errors in the amount of current support owed, errors in the amount of the arrearage that had accrued, or mistaken identity of the alleged obligor. This provision is not intended to waive the withholding requirement if the obligor paid the past-due support after receiving notice that withholding was being implemented. The obligor could not contest the proposed withholding on other grounds such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation. These issues are important, but nonpayment of support

should not be used to obtain relief with regard to these problems. They should be pursued independently through separate legal actions.[9]

Within 45 days of the date the advance notice is issued, the State must provide an absent parent who contests a wage withholding an opportunity to present his or her case to the State, determine if the withholding is valid, and notify the absent parent, if appropriate.[10] For States in which the administering agency is the court system, the hearing generally will be the type of judicial hearing normally provided to a judgment debtor who contests execution on the judgment, the scope of which will be limited to mistakes of fact. For States in which an executive agency administers the procedure, an administrative hearing will be given. The Act does not require a formal hearing. Indeed, given the limited scope of the hearing, many States may opt for a less formal hearing.

If the results of the hearing allow the withholding to occur, the administering agency must notify the obligor of the decision and serve a withholding notice, or order, on the employer within 45 days of the advance notice. The Act limits the amount of information that may appear in the employer notice to "such information as may be necessary for the employer to comply with the withholding order."[11] The employer must be required to withhold so much of the parent's wages

> . . . as is necessary to comply with the order and provide for the payment of any fee to the employer which may be required under paragraph (6)(A), up to the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. 1673(b)). If tnere are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support and provide for the fee, may not exceed the limit permitted under such section 303(b), but the State need not withhold up to the maximum amount permitted under such section in order to satisfy arrearages. [42 USC 666(b)(1).]

The Federal Consumer Credit Protection Act (FCCPA) determines the maximum part of an individual's aggregate disposable earnings that are subject to "garnishment" to enforce an order for the support of any person. These limits are 50 percent of disposable earnings for an absent parent who is the head of a household and 60 percent for an absent parent who is not supporting a second family. These percentages increase an additional 5 percent, to 55 and 65 percent respectively, where the arrearages represent support that fell due more than 12 weeks prior to the current pay period. [15 USC 1673(b).]

The FCCPA defines *garnishment* as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for the payment of any debt." [15 USC 1672(c).] In addition, the FCCPA preempts less restrictive State laws. [15 USC 1677.] Thus, the Federal requirement will apply even in a State that does not incorporate the FCCPA limitations into its wage withholding statute. [*Marshall v. Dist. Ct. for 41b Jud. Dist.*, 444 F. Supp. 1110 (E.D. Mich. 1981); *G.M.A.C. v. Metropolitan Opera Assn.*, 98 Misc.2d 307, 413 NYS2d 818 (Sup.Ct.App.Div. 1980).] States are free to enact statutes which provide for greater protection of a debtor's disposable earnings. [15 USC 1677; *Crane v. Crane*, 417 F.Supp. 38 (E.D. Okla. 1976); *Ferry v. Ferry*, 271 NW2d 450 (Neb. 1979).]

On receiving the notice, the employer must begin withholding the appropriate amount of the obligor's wages "no later than the first pay period that occurs after 14 days following the date the notice was mailed."[12] The Act regulates closely the language in State statutes regarding other rights and liabilities of the employer. For instance, the employer must be subject to fine for discharging any absent parent from employment, or taking other forms of retaliation, because of a withholding.[13] In addition, the employer must be held liable to the State for amounts that the employer fails to withhold as directed.[14]

The Act also requires State law to contain provisions that make it easy for employers to comply with their responsibilities under the Act. As noted above, the statute may allow the employer to retain a fee in order to offset some of the cost of the withholding if the State permits a fee to be deduced.[15] Furthermore, the employer must be allowed to combine all support payments it is required to withhold into a single payment, to be forwarded to the agency or court with a list denoting the cases to which the payment applies.[16] The employer need not vary from its normal pay and disbursement cycles in order to comply with withholding orders,[17] but it must forward the support payment to the State, or other designated recipient, within 10 days of the date the employee/absent parent is paid.[18]

When the obligor changes jobs, the employer upon whom a wage withholding has been served must be required to notify the court or agency that entered the wage withholding order and provide specified information,[19] and the State must notify the new employer to continue withholding from the obligor's wages.[20] Similarly, State statutes must provide for terminating wage withholding orders in appropriate circumstances, such as when all of the children have become emancipated or when it is impossible to forward amounts withheld to the custodial parent because his or her whereabouts are unknown. "In no case should payment of overdue support be the sole basis for termination of withholding."[21]

Other provisions require that the wage withholding be given priority over other legal processes brought under State law against the same wages of the obligor,[22] and that the procedure be applied in interstate cases.[23] (Interstate wage withholding is discussed in detail Chapter 9.) The Act also allows States to implement statutes which expand the definition of wages to include forms of income other than those normally included in the definition.[24]

Expanded use of income withholding procedures should change the principal method of enforcing child support obligations in many States. Moreover, the summary nature of the process, and the replacement of court hearings with administrative hearings in many States, will reduce the role of the IV-D attorney in enforcement proceedings in cases where the obligor is employed and the employer is known. Nevertheless, the IV-D attorney will continue to have an important role in overseeing the process in many jurisdictions, especially during the implementation phase. There will be challenges to the procedure in many jurisdictions as well. For this reason, every IV-D attorney must become familiar with the requirements of the Federal statute and regulations, as well as the procedure adopted by the State in which he or she works.

JUDGMENTS

In most States, child support orders are enforceable by the same means as regular court judgments. The word order is used instead of judgment because a decree ordering support, looks to the future. When it is issued, the order is not a judicial determination of a "sum certain." Nevertheless, in most States a judgment arises on the date a support payment is due and not made.[25] The judgment automatically increases as subsequent payments are missed. Because any remedy that might be used to enforce the order would be by definition a postjudgment remedy, the obligor may not be constitutionally entitled to notice and a predeprivation hearing. [See Sanchez v. Carruth, 568 P2d 1078 (Ariz.App. 1977).]

In other States, the order is not entitled to judgment status.[26] In these States, it is necessary to reduce the arrearages to judgment prior to depriving the obligor of his or her property through an enforcement remedy. The procedure to reduce the arrearage to judgment can take many forms. The judgment can be established through a special proceeding filed under the original case number in the same court that entered the support order. In some States, the judgment must be sought in a court different from the one that entered the order, because the latter is a court of inferior jurisdiction and lacks authority to enter money judgments. In these States, it may be necessary to invoke a formal transfer proceeding, in addition to the enforcement proceeding, in order to get the case before the appropriate court.

The most common procedure in such States combines the request for judgment with a contempt proceeding. Exhibit 6.1 (in the appendix to this chapter) provides a sample prayer for entry of judgment. In States where the arrearage obtains the status of a judgment automatically, the total arrearage can be substantiated simply by referring to the court's payment record or by presenting to the court clerk an affidavit executed by the obligee. Once the amount of the arrearage is determined, the amount of the judgment can be noted on the record, or execution may issue.

A judgment is advantageous in child support cases for the following reasons:

- A judgment may create a nonpossessory lien against the obligor's property. (See below for a discussion of the creation and use of judgment liens.)

- The judgment may forestall the obligor's ability to seek retroactive modification of the arrearage.[27]

- Postjudgment remedies require that less cumbersome procedural protections be afforded the obligor than do prejudgment remedies. This can be particularly important in Federal tax refund setoff proceedings. [See Jahn v. Regan, 584 F.Supp. 399 (D.C. Mich. 1984).]

- Should the obligor die, a judgment may be entitled to a higher priority in probate proceedings than an unliquidated claim for support arrearages. Indeed, a judgment may be a condition precedent to filing the claim. [See Austin v. Austin, 364 So2d 301 (Ala. 1978).]

- The burden of proof regarding payment, or other form of satisfaction, may switch from the obligee to the obligor once the arrearage is reduced to judgment.

- Reducing the arrearage to judgment may change the applicable statute of limitation, thereby preserving the collectibility of payments that fell due in the distant past. Typically, the statute of limitation that applies to judgments is 5 to 20 years. (See Chapter 7 for a discussion of statutes of limitation as applied to support obligations.)

- Establishing a judgment may limit the court's discretion as to whether enforcement remedies may be employed; normally a judgment creditor has a right to use all available legal remedies.

- Should the obligor move to another State, the existence of an in-State judgment allows enforcement to be accomplished in-State where the obligor is employed by a corporation that "does business" within the State, where he or she is employed by the Federal government, or where he or she otherwise has property or wages that are subject to the jurisdiction of an instate court.

- A judgment is entitled to full and credit in other State courts.

Clearly, States that have conferred automatic judgment status on their child support orders are one step ahead of States in which arrearages must be reduced to judgment. At least two States, Oregon and Nebraska, have done so by statute.[28] Child support enforcement attorneys who believe that automatic judgments could make enforcement easier should press their legislatures for such an amendment.

LIENS AGAINST REAL AND PERSONAL PROPERTY

The Child Support Enforcement Amendments of 1984 require States to implement "procedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the State."[29] In stark contrast to the wage withholding requirement, the Federal statute neither defines lien nor provides any guidance as to when a lien must be created. It does direct States to establish guidelines to determine whether or not to create a lien on a given case.

As used here, the term lien means a nonpossessory interest that a support obligee (or the State, by virtue of the assignment of support rights) obtains in a piece of real or personal property as a result of the entry of a support order, subsequent noncompliance by the obligor, and compliance by the obligee with all procedural steps required by State law as to the creation of liens. (Procedural variances that exist in the States will be discussed below.) This working definition excludes the "wage lien" used in some States (for example, Maryland[30]) to withhold wages from an obligor, and the possessory lien that a judgment creditor obtains after the sheriff seizes a piece of personal property pursuant to a writ of execution.

A lien, as used here, refers to a "slumbering" interest that allows the obligor to retain possession of the piece of property, but which prevents transfer of the piece of property unless the lien is satisfied. A lien statute prevents transfer of affected property either directly (by prohibiting the recording agency from issuing a new title or deed) or indirectly (by providing that all subsequent interests in the property will be subject to the lien). The latter method is the most common. It works because subsequent potential purchasers and lenders receive notice of the existence of the lien during the process of transferring the title or deed. The potential purchaser or lender reacts to this "cloud on the title" by requiring the obligor to satisfy the lien, or obtain a release from the obligee, before agreeing to go forward with the transfer or loan. In real property transfers, the potential purchaser or lender discovers the lien through the title search conducted by the title insurance company. Personal property liens require notice to subsequent purchasers and lenders as well, but the notice usually is provided by way of a note on the title of the property, or by serving notice on a third party possessor.

Typically, the lien will attach to all of the obligor's real property situated in the county in which the support judgment was entered and/or has been recorded. In some States (e.g., New Jersey), judgments are centrally recorded and create statewide liens on real property. As such, the lien document (if there is one) does not have to refer to specific property in order to prevent a sale or other transfer. In most States, the lien also will attach to property attained by the obligor after the lien has arisen.

The lien will last for a number of years, depending on the statute, and generally may be revived for an indefinite number of additional periods, as long as the underlying judgment survives. The lien may grow automatically, as the arrearage increases, and even may take priority over subsequent liens created by other creditors if the statute so provides.

Procedure to Perfect

Procedures for establishing liens vary among the States. In a few States, the lien arises automatically upon the entry of a support order and the first incidence of noncompliance by the obligor. Most States require the obligee to take some affirmative act to create the lien. This act may be as simple as recording a transcript of the support order or judgment in an appropriate office of public records (typically the recorder of deeds for real property and the title agency for personal property), or as complicated as filing an independent action to reduce the arrearage to judgment, obtaining a specific order from the court establishing the lien as to an identified piece of property, and directing the appropriate public official to note the existence of the lien on the title or deed.

The most effective procedure adopts a middle ground. The obligee files a certified copy of the support order, and perhaps attaches an affidavit detailing the amount claimed to be due and owing as of the date of recording. This latter requirement may not be necessary where the support order is payable to the court or other public registry such that the amount of the lien at any point in time can be determined by reference to public records. In addition to these two documents, it is customary to include a cover document requesting the court clerk, recorder of deeds, or title agency to file the documents and carry out any steps required by the statute to establish the lien. Exhibits 6.2 to 6.4 are typical lien forms.

Once the lien is created, the obligee takes no further steps until immediately before the lien expires. At that point, the statute should prescribe a method to "revive" the lien. Assuming the case warrants further effort based on established criteria, the lien should be revived prior to its expiration. Failure to revive the lien may allow the obligor to dispose of property without having to apply the sale proceeds to his or her arrearage, and may cost the child support obligee a priority over other lienholders.

Revival procedures vary among the States as well. Some States still employ the common law procedure. The obligee must obtain a writ of scire facias from the court that entered the order (or the court where the lien was created, if not the rendering court) and attempt service of the writ on the obligor. The issuance of the writ generally effects the revival, even if it cannot be served until after the initial lien expires, and the second lien dates back to the date of the initial lien's creation for priority purposes. Some States allow a judgment lien to be revived by issuance of a writ of execution at any time prior to dormancy. In other States, the lien must be revived by a separate "action in debt," seeking the entry of a new judgment based on the first judgment and an allegation of nonsatisfaction. The lien perfection procedure must be complied with anew in order to revive the lien. The second judgment lien attaches to property owned by the obligor as of the date of the creation of the second lien, and the priority of the lien is determined as of that date.

Satisfaction and Release

Most lien statutes contain provisions allowing for a voluntary lien release by the obligee, and establishing a procedure whereby the obligor can petition the rendering court for an order releasing the lien if the obligee refuses to execute a voluntary release. Such a release can be general or limited to specific property. In order to obtain a court order releasing the lien, the obligor generally must post a bond, provide other security, or satisfy the court that releasing the lien will not leave the obligee in an insecure position.

Most liens either will expire of old age or be released voluntarily by the obligee. The obligor generally requests a voluntary release when he or she attempts to sell the property or borrow money using it as collateral, and the existence of the lien becomes known to the purchaser or lender. At this point, the lien becomes a powerful collection remedy. If the obligor wants to sell the property or obtain a loan, he or she must obtain a voluntary release of lien as to the specific piece of property involved. (There generally will be insufficient time and grounds to petition the court for an involuntary release.) Clearly, the obligee has a great deal of leverage in such a situation, but the obligee should not prevent the transfer altogether. The sale or loan is likely to produce a pool of funds out of which a substantial payment on the support arrearage can be made. If the transfer is a sale, it is likely that the obligor has some equity in the property after prior lienholders (i.e., mortgagees) are paid off--otherwise the sale price would not be acceptable to the obligor. If the transfer is a loan or second mortgage, sometimes a portion of the loan proceeds can be applied to the child support obligation, or other arrangements can be made that are acceptable to the obligee.

Where the obligee is the custodial parent (non-AFDC cases), the IV-D attorney will need to confer with the parent in order to determine whether or not to release the lien based on the best terms available. Where the obligee is the State, the IV-D attorney will need to confer with the State official who possesses authority to execute a release on behalf of the State. If that authority has been delegated to the attorney, the attorney should follow policy in determining whether or not to agree to the release. Either way, the attorney should not insist on recovering the entire arrearage in return for a voluntary release. Nor should the attorney demand that the obligor turn over all of the benefit he or she is to derive from the transfer. The collection will occur only if the transfer occurs. The attorney should negotiate for the best immediate payment he or she can obtain, and attempt to secure payment of additional amounts by way of some other guarantee as a part of the release agreement.

Once the agreement is reached, there is usually a third party involved in the transfer (i.e., a real estate agent) who is willing to act as escrow agent to facilitate the exchange of the lien release for the payment. This allows the purchaser to pay off the lien, thereby diminishing any insecurities the purchaser might have regarding the validity of the title, instead of paying the obligor and trusting him or her to satisfy the lien.

A lien release is a contract and, like any other contract, must be drafted carefully so as to embody the entire agreement entered into between the parties. Moreover, lien releases are often the product of negotiations that can be quite unique. Furthermore, the result of the negotiation process can have profound effects on subsequent purchasers of the obligor's property (and the obligor's children) should something go awry. Thus, it is crucial that forms be tailored to each case, and the IV-D attorney should be involved heavily in the negotiation and drafting of each agreement and release. The legal description of the property must be transcribed carefully from the deed, and the statement of exactly what is being released must be drawn narrowly. A poorly drawn lien release could be construed as a satisfaction of the entire judgment, or a limitation of the obligee's right to use other remedies to enforce any arrears that might remain. A sample lien release form appears in the appendix to this chapter. [See Exhibit 6.5.]

In addition to executing lien releases, a judgment creditor occasionally is requested to enter a formal "satisfaction of judgment" with the court that entered the order. This may be particularly true in States where arrearages are entitled to automatic judgment status, a lien arises without the need of any affirmative act by the support obligee, and there is no central payment registry to act as an official record. A formal satisfaction is the only way a judgment debtor in such a situation can obtain a clear record. The obligee generally may enter the satisfaction by sworn affidavit or in person under oath.

LEVY AND EXECUTION

In this section, "levy and execution" refers to the statutory procedure that allows a judgment creditor to obtain a court order directing the sheriff (or other similar official) to seize property in the possession of the obligor, sell the property at a sheriff's sale, and apply the proceeds, less the costs of the sale, in satisfaction of the judgment debt. Because execution is statutory, the exact procedure will vary slightly from State to State.

As noted in the previous section, the Child Support Enforcement Amendments of 1984 do not define the term lien. In many States, a judgment creditor must take the steps necessary to create a lien prior to seeking levy and execution. Thus, the Act's requirement that a "lien" procedure be available could be construed to require that the lienholder obtain the right to enforce the lien by way of levy and execution, in addition to obtaining the nonpossessory interest discussed in the previous section. In most States, such a procedure is already available after judgment is rendered. In any event, as noted in the introduction to this chapter, the State IV-D agency must make use of proceedings to attach real or personal property if the State's law provides for such a procedure and the obligor or his property are subject to the jurisdiction of the appropriate court.

Obtaining the Writ

Generally, the levy and execution process is initiated by obtaining a writ of execution, or attachment, from the clerk of the court that rendered the order. In some States, the writ is issued by the court in the county where the property to be seized is located, regardless of the identity of the rendering court. In such a State, the support order or judgment first would have to be transferred (or registered) in the county where the property sits. The writ is directed to the sheriff of the appropriate county, or perhaps to any sheriff in the State, and orders the sheriff to levy on the property described in the writ and, after appraisal and a specified form of public notice, to sell the property at a sheriff's sale. Issuance of the writ is usually a ministerial act of the court clerk, and as such does not allow for notice and a hearing; nor does the clerk have discretion to refuse the writ request if all procedural steps required by the statute have been completed. Most court clerks provide forms for making the request.

In some States that require the support obligee to reduce arrearages to judgment prior to seeking execution, the judgment must provide specifically for execution before the writ can issue. In such States, the court may have some discretion regarding the language contained in the judgment. In these States attorneys routinely should draft proposed judgments that provide for execution.

The writ typically has a limited life span of less than a year. The expiration date specified on the writ is referred to as the "return date." The sheriff must seize the property, appraise it, schedule the sale and issue public notice, hold the sale, and turn over the proceeds less costs prior to the return date. If the sheriff is unable to locate the property during the period of the writ (which should occur only for personal property), the sheriff will make a "nulla bona" return. Successive writs are referred to as alias and plurius, as appropriate.

Seizing the Property

The procedure the sheriff follows will depend on whether the property to be seized is real or personal property. Real property is easier to levy against. The legal description and street address will give the sheriff sufficient information to identify and seize the property. The seizure is achieved by placing a notice on the property, notifying anyone on the property at the time of the levy, and placing a notice in the office of the recorder of deeds.

For personal property, the procedure is more difficult for at least two reasons. First, the property is often movable and thus difficult to locate. Second, the property may not be particularly unique in the community. As a result, the execution request should include very specific and complete information. The court clerk will transfer this information to the writ, enabling the sheriff to locate the piece of property. It may be desirable to accompany the sheriff to identify the property. If the property is capable of being seized physically and taken away, the sheriff will do so. If not, the seizure will be accomplished by some other act that effectively removes the item from the obligor's possession and notifies third parties that the property has been seized. This may be achieved by placing a sheriff's seal on the item in a manner that makes it incapable of being removed. If the item is seized physically, it will be transported to a storage facility maintained or arranged for by the sheriff.

Notice of Exemptions

In most States, certain types of a judgment debtor's property are exempt from execution. The exemptions are established by statute and generally protect tools of the obligor's trade, books, family heirlooms, and similar items from execution. Many States also allow the judgment debtor a homestead and automobile exemption in limited amounts. By statute, court rule, case law, or practice, the sheriff may be responsible for notifying the debtor of his or her exemption rights. The notice usually is accomplished with a form "notice of exemptions" provided by the court clerk's or the sheriff's office. Often, the sheriff provides a verbal explanation of the exemption rights to ensure that the debtor understands them. The exemption process usually requires that the debtor choose the property to be protected by the exemption, substituting nonexempt property for the exempt property listed in the writ.

Many States have enacted statutes providing that the normal exemptions do not apply to protect delinquent support obligors. The theory holds that the exemptions were designed to protect the judgment debtor's ability to provide for his or her family and should not be applied to frustrate the obligee's attempt to force payment of child support. The IV-D attorney should ensure that the exemption forms and practices being used by courts and sheriffs in such States reflect the special nature of executions for child support.

Notice and Sale

Notice and sale procedures are set forth in detail by statute and may differ depending on whether the property to be sold is real or personal property. Once the sheriff has seized the property and appraised its value to determine whether additional property should be seized in order to satisfy the judgment, the sheriff must schedule the sale and provide the public notice required by statute. The notice may have to be accomplished by posting advertisements in a newspaper, posting notices in the courthouse, or other similar method.

The statute also may prescribe the number of days in advance of the sale that the notice must appear, and the place and timing of the sale. For instance, some statutes provide that a real estate sheriff's sale must take place at a real estate exchange between the hours of 9:00 a.m. and 5:00 p.m. Personal property is often sold "on the steps of the courthouse."

Costs incurred in the storage and sale, along with execution and sheriff's fees, if applicable, are subtracted from the sale price, and the sheriff distributes the remainder to the judgment creditor together with a sheriff's deed to the property. The purchaser takes the property subject to prior liens and encumbrances, and subject to any right granted the debtor by statute to "redeem" the property by submitting the sale price, costs, and fees to the sheriff within a specified period of time. When the redemption period expires, the sheriff's deed matures into a regular deed.

Practical Considerations

Because storage and notice costs can be high and prior encumbrances cannot be avoided, the IV-D attorney should take great care in choosing cases for levy and execution. The following analysis should occur prior to requesting execution:[31]

- Are there prior liens or secured creditors?

- Is the market for the piece of property depressed, making it a bad time to hold a sale?

- What are the anticipated costs?

- Given the above, will the likely sale proceeds produce a significant payment on the arrearage?

- Will depriving the absent parent of the piece of property decrease his ability to earn or cause him to flee the jurisdiction?

Prior liens and security interests can be determined by checking title records and other public records, such as the Motor Vehicle agency or the Uniform Commercial Code purchase money security interest registry. The likely sale price sometimes can be determined by consulting with the sheriff's office as to the price similar property has been bringing in recent months.

GARNISHMENT

Garnishment is a statutory procedure allowing a judgment creditor to seize a judgment debtor's property that is in the possession of a third person, and apply the property to the judgment debt. In the child support context, garnishment has been a very effective remedy in some States, and has been used to seize wages, bank accounts, workers' compensation benefits, pension benefits, and unemployment compensation benefits. It is generally a remedy with a limited time scope, usually days or months. Garnishment cannot be used in most States to collect current or future support; the amount of the garnishment is limited to the amount of arrears due on the date the writ issues.

The future use of garnishments to reach wages will decrease markedly due to the income withholding provision of the Child Support Enforcement Amendments of 1984. Nevertheless, attorneys should continue to use this remedy to obtain other types of property.

Procedure

The first step in the garnishment process is to compute the amount of outstanding arrearages, including interest, if permitted by statute. The custodial parent should prepare an affidavit to document the payments he or she has received from the obligor, especially with respect to any periods during which the order was not payable through the court or other official registry. A representative of the IV-D agency should prepare a second affidavit if payments were to have been made directly to the agency for any of the applicable period.

Next, a writ of execution or garnishment must be requested from the court that entered the order. The writ should direct the sheriff in the county in which the garnishee is located to serve the writ. If the absent parent is a Federal employee or in the military, the writ may be served by certified mail, pursuant to 5 CFR 581. The execution request form, and the writ itself, generally will contain blanks for identifying the source of the judgment, alleging the arrearage, and identifying the garnishee.

In addition to the writ, the sheriff will serve a notice on the garnishee, informing him or her of the effect of the garnishment, and instructing him or her as to the applicable exemptions for child support garnishments. This notice vests the court's jurisdiction over the garnishee, so it is crucial that the notice comply with all statutory requirements. [See 6 Am.Jur.2d, Attachment and Garnishment, sec. 337.] Some States require that the obligor be notified as well. Most sheriffs' offices have preprinted forms for this purpose. The IV-D attorney should confirm that the forms in use accurately state the child support exemption situation. It is also a good practice to obtain blank copies of the notice forms and fill them out completely prior to requesting execution.

The final document to be served on the garnishee is the interrogatory form. Normally, there are only four or five interrogatories, and these are designed to be easy for the garnishee to complete and file with the court within the time limit set by statute. The interrogatories require the garnishee to disclose any property acquired by the obligor during the period in which the garnishment was in effect. The garnishee also may set up any defenses to the garnishment that the garnishee, or the obligor, may have.

On the return date, the garnishee delivers the interrogatory answers to the sheriff or, more often, mails them to the court and the attorney for the obligee. The court clerk then may issue a pay-in order, directing the garnishee to pay the garnishment proceeds over to the sheriff. Often, the garnishee will pay the proceeds to the sheriff or court together with the interrogatory answers. Occasionally, the garnishee fails to answer the interrogatories or to withhold and deliver the obligor's property, or the obligee's attorney will suspect that the interrogatory answers are untrue. The garnishment statute usually will provide for a subsequent proceeding allowing the obligee to seek judgment against the garnishee for the value of the property that should have been withheld and paid over to the sheriff. In some States, the obligation to answer the interrogatories may be enforced by way of contempt proceedings as well.

Payment by the garnishee to the obligor constitutes satisfaction of the debt owed by the garnishee to the obligor. Thus, the garnishee is protected from double liability.

Constitutional Limitations on Garnishment

The U.S. Supreme Court's opinion in the case of Shaffer v. Heitner, 97 SCt 2569, 53 LEd2d 683 (1977), prevents the use of prejudgment garnishments to obtain in rem jurisdiction over a debtor. This holding applies with equal force to child support and paternity situations except where "extraordinary circumstances" exist, such as:

- The defendant has been avoiding service of process.
- The defendant is about to remove his or her person or property out of the State.
- The defendant has conveyed or is about to convey property fraudulently so as to hinder or delay enforcement attempt.[32]

Where such extraordinary circumstances exist, it still may be possible to initiate an action to establish a support obligation, or establish paternity, by seizing property of the debtor that is in the hands of a third party in the jurisdiction. Procedural hurdles may include an ex parte hearing to establish the existence of the extraordinary circumstances, to devise an appropriate form of service of process on the obligor, and to set the amount of the bond to be filed by the obligee.

With respect to postjudgment garnishments (and income withholding), the chief constitutional issues are: (1) the time, manner, and extent of notice to the absent parent; and (2) the timing of the hearing. The Due Process Clause of the Constitution provides certain protections to individuals whose property or liberty is being affected adversely by the State. Due process, of course, is a variable concept depending on the individual requirements of each case. The various conflicting private and public interests affected by the State action must be analyzed and balanced, and the risk of erroneous deprivation of a protested interest must be evaluated, given the procedure under scrutiny. [Mathews v. Eldridge, 424 US 319, 96 SCt 893, 47 LEd2d 18 (1976).]

The U.S. Supreme Court has dealt with the postjudgment seizure question on two occasions. In Endicott-Johnson v. Encyclopedia Press, Inc., 266 US 285 (1924), and Griffin v. Griffin, 327 US 220 (1946), the Court addressed the issue of whether notice and hearing must be provided before postjudgment remedies may be applied. Endicott dealt with wage garnishment. Griffin involved an out-of-State support judgment and the procedure for obtaining a writ of execution in the second State. Although the two cases involved identical constitutional issues, the results were inconsistent. Endicott held that the judgment debtor is not entitled to preseizure notice and hearing, while Griffin held that notice and hearing are required.

In Endicott, the Court rejected the due process complaint, stating:

> The established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.

Endicott has never been overruled, despite the existence of Griffin, and continues to provide authority for execution to satisfy judgment debts, as evidence by numerous appellate decisions. [Huggins v. Deinhard, 654 P2d 32 (Ariz.App. 1982); Casa del Rey. v. Hart, 643 P2d 900 (Wash. 1982); Gedeon v. Gedeon,, 630 P2d 579 (Colo. 1979); Hartford Elec. Light Co. v. Tucker, 438 A2d 828 (Conn. 1981); Mitchell v. Mitchell, 611 P2d 373 (Utah 1980); Black v. Black, 377 A2d 1308 (R.I. 1977); Sanchez v. Carruth, 568 P2d 1078 (Ariz.App. 1977); In re Marriage of Crookshanks, 116 Cal.Rptr. 10 (Cal.App. 1974); Bittner v. Butts, 514 SW2d 566 (Mo.1974); Halpern v. Austin, 385 F.Supp. 1009 (N.D.Ga. 1974); Langford v. Tennessee, 356 F.Supp. 1163 (W.D.Tenn. 1973); Moya v. DeBaca, 286 F.Supp. 1163 (D.N.M. 1968).]

Curiously, despite the strength of the cited case law, Endicott has not established a firm rule. In Griffin, the Supreme Court rejected the Endicott rationale without expressly overruling the prior decision. Under the terms of a 1924 New York divorce decree, the husband was ordered to make monthly support payments of $250. The husband failed to comply and the wife obtained judgment after notice and hearing. In 1936, she obtained the docketing of a second judgment, this time without notice to the husband. The wife then attempted to enforce the second judgment in the District of Columbia. The Supreme Court held that it would be a violation of the husband's right to due process to allow enforcement of the judgment in the District of Columbia because of the lack of notice and hearing before the order was reduced to judgment in New York. The husband was prevented thereby from raising any defenses he might have possessed, which included filing a motion for retroactive modification or proving payment or satisfaction. The Court concluded that additional due process was required because enforcement proceedings "affect[ed] his rights in ways in which the 1926 decree did not." [327 US at 229.]

Another trend is important. Beginning in 1969, the Supreme Court struck down a number of prejudgment garnishment statutes that did not provide for preseizure notice and hearing. [See Sniadach v. Family Finance Corp., 395 US 337, 89 SCt 1820, 23 LEd2d 349 (1969); Fuentes v. Shevin, 407 US 67, 92 SCt 1983, 32 LEd2d 556 (1972); Mitchell v. W.T. Grant, 416 US 600, 94 SCt 1895, 40 LEd2d 406 (1974); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 US 601, 95 SCt 719, 42 LEd2d 751 (1975).] These cases, combined with

Griffin, recently have produced a number of decisions striking down postjudgment garnishments and executions where the procedure used did not provide for preseizure notice and hearing. [See Deary v. Guardian Loan Co., 534 F.Supp. 1178 (S.D.N.Y. 1982); Finberg v. Sullivan, 634 F2d 50 (C.A.3 1980); Betts v. Tom, 431 F.Supp. 1369 (D. Hawaii 1977); Brown v. Liberty Loan Corp., 392 F.Supp. 1023 (M.D. Fla. 1974).]

These decisions typically have referred to Griffin and Mathews v. Eldridge, supra, and have noted the proliferation of exemption rights that have been established in recent years to insulate debtor's property from execution. The decisions have held that preseizure notice and hearing are necessary to lessen the risk that a judgment debtor will be unable to assert his or her exemption rights.

It is virtually impossible to reconcile these two lines of case law, and it is doubtful that such a reconciliation will come from the Supreme Court in the near future. At least four times since 1969, the Supreme Court has refused to overrule Endicott. [See In re Marriage of Crookshanks, supra; Mova v. DeBaca, supra; Hannen v. DeMarcus, 390 US 736 (1968); Elkin v. Elkin, -- US -- (1985).]

The issue of when the judgment debtor must be provided a hearing is similarly unsettled. Even in prejudgment cases, the Supreme Court has indicated that a predeprivation hearing may not be necessary as long as safeguards are built into the process to ensure that the creditor's claim is valid, and that an immediate postseizure hearing be provided for. [Mitchell, supra, p. 615, 616; Di-Chem, supra, p. 722, 723.] Such safeguards generally are built into postjudgment garnishment processes as applied to child support enforcement, in that:

- A hearing was held at the time the order was established.
- The payments are paid through the court or other public registry.
- A postseizure hearing is available while the garnishee is still in possession of the obligor's property.

Garnishing Wages

In child support enforcement, the mandatory wage withholding procedure will replace wage garnishment in all but a few circumstances. Garnishment may continue to be useful when:

- The family is no longer receiving child support enforcement services and an arrearage is due and owing to the State.
- The State's garnishment procedure is quick and easy; the garnishment could be used to collect support while the notice and hearing procedure of the wage withholding statute is being complied with.

In addition, much of the statutory and case law regarding wage garnishment will continue to apply in serving and enforcing income withholding orders under the new procedure. This discussion will focus on two such topics: (1) the percentage of an obligor's disposable earnings that is subject to garnishment; and (2) the person who is authorized to accept service of a wage garnishment on behalf of an employer.

The FCCPA restricts the amount of an individual's disposable earnings that can be garnished to enforce a support obligation. Prior to 1977, when the Tax Reduction and Simplification Act was passed, there were no Federal limitations, and many States allowed 100 percent of an obligor's wages to be garnished. 15 USC 1673(b) now provides that the maximum amount of an individual's disposable earnings that may be garnished for support is as follows:

- 50 percent if the individual is supporting his or her spouse, or a dependent child
- 60 percent if the individual is not supporting any such additional persons
- These percentages increase to 55 and 65 percent, respectively, if the garnishment is issued to collect support payments that fell due more than 12 weeks earlier.

The FCCPA does not preempt the law of garnishment entirely. These percentages represent the maximum that State law may allow to be garnished. Where State and Federal law conflict, the law that provides the debtor with the greatest protection applies. In addition to the percentage limitations, the FCCPA prohibits an employer from discharging an employee as a result of a garnishment for only one indebtedness. [An annotation of Federal and State case law construing the FCCPA appears at 14 ALR Fed 447.]

Garnishing Out-of-State Wages

It is often possible to garnish wages earned outside the State in which the children reside, as long as an order exists in that State (or can be registered in that State), the court that entered the order had personal jurisdiction over the absent parent and subject matter jurisdiction over the cause of action that produced the order, and the court has jurisdiction over the employer. "It is well settled that a foreign corporation authorized to do business in a State and subject to process therein may be garnished on a debt owing to a nonresident of the State. . . ." [Champion Intern. Corp. v. Ayars, 587 F.Supp. 1274 (D.Conn. 1984), quoting Mechanics Finance Co. v. Austin, 8 N.J. 577, 86 A2d 417 (1952); Garrett v. Garrett, 30 Colo.App. 167, 490 P2d 313 (1971); Little v. Little, 34 N.J.Super. 111, 111 A2d 517 (1954); Birl v. Birl, 48 Del.Co. 387, 24 Pa.D.&C. 412 (Pa.Super.Ct. 1961); but see Morrill v. Tong, 45 NE2d 1221 (Mass. 1983).] In the Ayars case, the U.S. District Court for Connecticut specifically rejected the absent parent's argument that the enforcing court must have physical power (jurisdiction) over the administrative branch of the corporation that will be responsible for carrying out the terms of the garnishment order. The court held that a corporation is a single "person" and rejected the absent parent's argument on public policy grounds.

Service of Process

One lesson child support enforcement attorneys have learned from using garnishment as an enforcement remedy is the crucial importance of instructing the sheriff, or other process server, to serve the correct individual. Typically, garnishment statutes require personal service on individuals and partnerships, with respect to corporate garnishees, as follows:

> Notice of garnishment shall be served on a corporation, in writing, by delivering such notice, or a copy thereof, to the president,

> secretary, treasurer, cashier, or other chief or managing officer of such corporation; provided, such notice may be served on a railroad corporation by deliverying the same, or a copy thereof, to any station or freight agent of such corporation, and on insurance companies not incorporated by or organized under the laws of this State, by delivering the same, or a copy thereof, to the superintendent of the insurance department. [Section 525.030 RSMo 1978.]

In addition, many State statutes governing corporations include a provision which requires all corporations "doing business" within the State to appoint a registered agent to accept service of process on behalf of the corporation. The registered agent, or corporate officer, can be identified by contacting the State agency that maintains the records required by the corporations statute, usually the Secretary of State.

Again, because garnishment is a creature of statute, strict compliance with all statutory requirements is essential. Anything short of full compliance will fail to confer upon the court the necessary jurisdiction over the garnishee. [6 Am.Jur.2d, Attachment and Garnishment, sec. 339.]

There is much case law regarding the definition of "general" or "managing" agent for purposes of accepting process on behalf of a corporation. Missouri courts have construed the above statute to define valid service as service on an officer or "a duly constituted executive officer whoses authority and powers are such that he is regularly in control of the operations and business of the corporation." [Smith v. Bennett, 472 SW2d 623 (Mo.App. 1971); see Anno., 17 ALR3d 625.]

The case law may not clarify the definition of managing or general agent sufficiently to allow the IV-D attorney to choose an individual for service. Especially with respect to large employers, the sheriff's office often can identify an individual who has accepted service on behalf of an employer in the past. If not, it may be prudent to consult the records maintained by the Secretary of State in lieu of serving an unidentified payroll officer or manager.

Garnishing Bank Accounts

Bank accounts can be very good collection sources. Three issues regarding the garnishment of bank accounts can cause problems, however: (1) discovering the existence and identifying of the account; (2) discovering which branch of a bank may accept service of process to affect the account; and (3) if the absent parent has remarried or has a joint account with another individual such as a business partner, determining if the account is subject to garnishment for enforcement of the absent parent's obligation.

Finding the existence of a bank account used to be a difficult task because the account had to be discovered without alerting the absent parent that the search was taking place. However, the Office of Child Support Enforcement has developed a system for locating absent parents using tax form 1099, with which banks report interest earned on bank accounts. Although information gathered this way is intended primarily for parent location and must be reverified, pursuant to 26 USC 6103 before it can be used for any purpose, the method has proved to be very useful. In addition, State IV-D agencies have developed methods of discovering their existence. Often, the custodial parent (or the children, if visitation is occurring) will know where the absent parent banks.

Landlords, mortgagees, and credit reporting agencies can be sources of information as well. Some jurisdictions accept personal checks for child support payments and then keep a record of the account number and location. Once a lead is obtained, it is often possible to confirm the existence of the account over the telephone. This practice has developed in some areas to allow potential lenders to confirm the existence of an account prior to extending credit and to allow merchants to confirm the existence of the account prior to accepting a check.

Unfortunately, discovering the existence of the account is not the IV-D agency's last problem. With the increase in branch banking, it is not unusual for a bank to have branches in many different locations. According to the annotation at 12 ALR3d 1088, a general rule is emerging which holds that "each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office." [Cronan v. Schilling, 100 NYS2d 474 (Sup. 1970).] Accordingly, accounts may be garnished only by serving the writ at the bank location that is holding the funds for the depositor. One very old case establishes a contrary rule in Illinois. [Bank of Montreal v. Clark, 108 Ill.App. 163 (1908).] Due to the advent of automatic teller machines, many depositors now may withdraw their funds on deposit at all branches of the bank. This development may produce a change in the general rule.

Either way, now that the banking community is highly computerized, it generally will be possible to obtain the location of the account by contacting the main office. Once done, it is possible to serve the appropriate officer at the branch where the account was created.

Once the garnishment has been issued and served, the most troublesome problem concerns interests held in the account by third parties. Generally, creditors can garnish a joint bank account to enforce judgment debts owed by one of the depositors. [See Anno., 11 ALR3d 1465, but cf. Comstock v. Morgan Park Trust and Savings Bank, 319 Ill.App. 253, 48 NE2d 980 (1943) and Andree v. Equitable Trust Co., 420 A2d 1263 (1980).] Where this is the rule, courts are split as to whether the entire account is subject to garnishment [Park Enterprises, Inc. v. Trazch, 233 Minn. 467, 47 NW2d 194 (1951)] or whether only the judgment debtor's interest in the account is reachable. [United States v. Nat. Bank of Commerce, 554 F.Supp. 110 (E.D.Ark, 1982); Purma v. Sark, 224 Kan. 642, 585 P2d 991 (1978); Nieman v. First Nat. Bank, 420 SW2d 20 (Mo.App. 1968); Beehive State Bank v. Rosquist, 21 Utah2d 17, 439 P2d 468 (Utah 1968).] In States that recognize the concept of tenancy by the entireties, many courts have concluded that when a debtor opens an account with his spouse (in child support situations, the second wife), the entire account is protected from garnishment, except to collect joint debts.

Garnishment Against Federal Employees

Pursuant to 42 USC 659, monies due from or payable by the United States as remuneration for employment to any individual, including members of the armed services, is subject to garnishment in like manner and to the same extent as if the United States were a private person. This waiver of sovereign immunity is limited to garnishments to enforce an obligor-employee's legal obligation to provide child support or make alimony payments. P.L. 95-30 amended 42 USC 659 to define valid service of process in such garnishment proceedings. This remedy is available whether or not the children are receiving AFDC benefits. [See Anno., 44 ALR Fed 494.]

The waiver of sovereign immunity does not confer jurisdiction upon the Federal court to issue writs of garnishment upon the Federal Government. [Kelly v. Kelly, 425 F.Supp.

181 (W.D.La. 1976); Overman v. United States, 563 F2d 1287 (C.A.8 1977).] Nor does the Federal statute create a garnishment remedy in States that do not have such a procedure. The writ of garnishment must issue pursuant to existing State procedure and must emanate from the State court that rendered the order to be enforced. [See Morrison v. Morrison, 408 F.Supp. 315 (N.D.Tex. 1976); Popple v. United States, 416 F.Supp. 1227 (W.D.N.Y. 1976); U.S. v. Morton, 104 S.Ct. 2769 (1984).]

Service of the writ is accomplished pursuant to 42 USC 659, as follows:

> Service of legal process brought for the enforcement of an individual's obligation to provide child support or make alimony payments shall be accomplished by certified or registered mail, return receipt requested, or by personal service, upon the appropriate agent designated for receipt of such service of process pursuant to regulations promulgated pursuant to Section 416 (or, if no agent has been designated for the governmental entity having payment responsibility for the monies involved, then upon the head of such governmental entity). Such process shall be accompanied by sufficient data to permit prompt identification of the individual and the monies involved. [42 USC 659.]

The Office of Personnel Management has published regulations at 5 CFR 581, including a listing of agents designated to accept legal process. [5 CFR 581, App. A.]

Under 42 USC 659(a), only monies to be paid to the obligor as "remuneration of employment" are subject to garnishment. Several cases have held that this definition includes military retirement pay. [Watson v. Watson, 424 F.Supp 866 (E.D.N.C. 1976); Crane v. Crane, 417 F.Supp. 38 (E.D. Okla. 1976).] Conversely, veterans' disability benefits being paid to a veteran who waived all rights to military retirement pay are not garnishable. [Sanchez Dieppa v. Rodriguez Pereira, 580 F.Supp. 735 (DC Puerto Rico 1984).]

Related attorneys' fees are recoverable to the extent that they are entitled to judgment status in the State. [Garrett v. Hoffman, 441 F.Supp. 1151 (E.D. Pa. 1977); Murray v. Murray, 558 F2d 1340 (C.A.8 Mo. 1977); 42 USC 662.]

Garnishing Workers' Compensation Benefits

Workers' compensation statutes spread the financial risk that workers face each day on the job. They mandate that a form of insurance be provided to each worker involved in a covered activity, to compensate the worker for the financial cost of injuries sustained on the job. To this end, virtually all workers' compensation statutes protect personal-injury awards by exempting them from seizure by the worker's creditors. These exemptions have been construed liberally by the courts as applied to the claims of general creditors. [31 ALR3d 532, 535.] However, the courts have been willing to limit the exemption's application to child support, alimony, and governmental claims.

Recent cases have held that workers' compensation awards may be garnished to enforce child support orders. These decisions have noted that a child support obligation is not a "debt" as the term was used in the exemption statute, and that allowing the garnishment would be consistent with the legislature's intent in enacting the exemption--to allow the injured worker to support his dependents in addition to himself.

[Dellesandro v. Dellesandro, 110 Misc2d 342, 442 NYS2d 400 (1981); American Mutual Life Insurance Company v. Hicks, 159 Ga.App. 214, 283 SE2d 18 (1981); Steller v. Steller, 97 NJ Super 493, 235 A2d 476 (1967); and Petrie v. Petrie, 41 Mich.App. 80, 199 NW2d 673 (1981).] There is contrary authority as well, including Satterfield v. Satterfield, 292 Or. 780, 643 P2d 336 (1981); and Bruce v. Bruce, 100 Ohio App. 121, 130 NE2d 433 (1955).

Once the exemption problem is overcome, the IV-D attorney must determine whom to serve with the garnishment and when to serve it. Generally, the workers' compensation insurance will be underwritten by an out-of-State insurance company, the identity of which can be obtained through the worker's employer. Insurance companies generally may be served through their registered agent (as defined above) or through a State official, such as the director of the insurance regulatory agency. In some situations, it also may be possible to serve the worker's attorney with a garnishment. [35 ALR3d 1094.]

Determining when to serve the garnishment can be a difficult decision, at least in States where garnishments are effective for short time periods. If the claim has yet to be settled and State law allows for consecutive garnishments, the best choice is to serve the insurance company immediately, and reissue garnishments as often as necessary to achieve an unbroken chain of weeks or months.

In some States, such as Kansas, garnishment is effective only as to debts owed by the garnishee to the judgment debtor at the moment in time the garnishment is served. In these States, it might be more effective to use a wage withholding statute (assuming the definition of "wages" is broad enough to encompass workers' compensation benefits) or to seek an equitable lien by asking the court to invoke its equity power to assist in enforcement of the order.

CIVIL CONTEMPT

A court has inherent authority to punish individuals for violating its valid judgments or decrees, and that authority has been recognized "since the dawn of judicial antiquity." [Zeitinger v. Mitchell, 244 SW2d 91 (Mo.App. 1951).] Any act or omission that embarrasses the court, lessens its authority or dignity, or obstructs the administration of justice constitutes contempt. Contempt is classified as either "civil" or "criminal." No clear line distinguishes civil from criminal contempt. However, civil contempt differs from criminal contempt in both purpose and procedure. If the purpose and character of the penalty imposed by the court is remedial and for the benefit of a private party to the action, the contempt is classified as civil. However, if the purpose of the penalty is to vindicate the authority of the court, the contempt is classified as criminal. [See Gompers v. Buck Stove Co., 211 US 324 (1911); In re Grand Jury Investigation, 600 F2d 420 (3d Cir. 1979); Commonwealth v. Fieck, 439 A2d 774 (Pa.Super. 1982); United States v. North, 621 F2d 1255 (3d Cir. 1980); In re Timmons, 607 F2d 120 (5th Cir. 1979)] This section discusses civil contempt, including the following subtopics: procedure; notice and hearing requirements of due process; the indigent contemnor's possible right to representation by counsel at State expense; elements of contempt; burden of proof and purgation requirements, and commitment procedure. The following section treats criminal contempt.

Procedure

In most jurisdictions, the contempt process is initiated by filing a Motion for Order to Show Cause as a supplementary proceeding in the cause of action which produced the underlying support order. The Motion is "heard" and ruled on by the court ex parte. In virtually all jurisdictions, the judge grants the motion and issues the Order to Show Cause without even an informal hearing. Most courts require the Motion to be supported by an affidavit from the payee or a certified copy of the clerk's payment record if the order is payable through the court for the period in question. After the judge reviews and signs the Order to Show Cause, it is processed by the court clerk's office. The clerk will check the court calendar for an available date, prepare an appropriate summons to accompany the Order, and forward the two documents to the appropriate sheriff's (or other process server's) office for service on the absent parent. [See Exhibits 6.6 and 6.7.]

Notice Requirements

In the case of In re Oliver, 333 US 257, 275, 68 SCt 499, 92 LEd2d 682 (1948), the U.S. Supreme Court held that due process requires that an individual charged with contempt of court ". . .be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf."

The obligor generally must have actual notice of the date and time of the hearing on the Order to Show Cause. If it can be established that the obligor is avoiding service of process, it is sometimes possible to serve the obligor's attorney of record (assuming the attorney-client relationship is intact) or to serve an adult at the obligor's residence. [See In re Morelli, 11 Cal.App.3d 819, 839 (1970).] In order to direct such service, it may be necessary to file an accompanying motion asking the court for permission prior to issuance of the summons. It also might be possible to direct the sheriff to attempt substituted service on a routine basis if personal service proves difficult. If the obligor appears at the hearing in response to the summons, actual notice will have been given and the issue will not have to be addressed. If he or she does not show up, it may be possible to justify the substituted service to the court as a step in obtaining a bench warrant.

In addition to the issue of getting the summons and order served on the obligor, there is an important issue surrounding the quality of the notice. The allegation contained in the Motion for Order to Show Cause and the language transferred to the Order itself must be specific enough to allow the obligor to prepare a defense at the show cause hearing. The specificity that will be required will vary from State to State, and even from case to case. Generally, it is prudent to allege the specific provisions of the support order, and set forth the obligor's payment record during the applicable period. Serving a copy of the Motion for Order to Show Cause with the supporting affidavit or court record is one possible way to meet this requirement.

Bench Warrants

In most States, a bench warrant may be issued directing the sheriff to arrest an obligor who is served with an Order to Show Cause but who fails to appear at the hearing. [See Cal.Civ.Proc. Code Section 1212.] The procedure after the obligor is apprehended varies from court to court. If the judge is available, many courts will notify the attorneys that the obligor has been brought in on the bench warrant, and a hearing on the Order to Show Cause will commence as soon as counsel can convene. When the judge who will hear the show cause hearing is not available, another judge will hold a preliminary hearing for the purpose of setting bail to secure the obligor's appearance at the show cause hearing. Some courts routinely follow the latter procedure, even when the appropriate judge is available.

Right to Counsel

As noted above, due process requires that the obligor be given the opportunity to be represented by counsel at the show cause hearing. This requirement has produced quite a bit of case law with respect to indigent obligors who ask for, and who are denied, counsel at State or county expense. The decisions are split on this issue. Generally, an indigent defendant possesses the right to court-appointed counsel only where a proceeding might result in deprivation of his or her liberty. [Lassiter v. Department of Social Services, 452 US 18 (1981).] Since imprisonment is a frequent outcome of the show cause hearing, some courts have held that counsel must always be provided to indigent contemnors.[33] Other courts take a middle position, holding that the right to counsel does not accrue until the court determines that imprisonment is a possible outcome.[34] Here, the trial court must make two findings prior to appointing counsel: (1) the contemnor is indigent and (2) the elements of contempt have been duly alleged by obligee's counsel. The third position is that, in civil contempt cases, by definition, the obligor will be imprisoned only if he or she has the present ability to purge himself of the contempt. If the obligor has that present ability, he or she is not indigent and does not need court-appointed counsel.[35]

Elements of Contempt

Five elements must be established to support a finding of contempt in a civil proceeding:

- Continuing personal and subject matter jurisdiction in the court that is holding the show cause hearing
- Existence of a valid and exact support order
- Knowledge of the order by the obligor
- Ability of the obligor to comply
- Willful noncompliance by the obligor.

[See Jafarian-Kerman v. Jafarian-Kerman, 424 SW2d 333, 341 (Mo.App. 1967); Gonzales v. District Court in and for Otero County, 629 P2d 1074 (Colo. 1981).]

Burden of Proof

The moving party in a civil contempt proceeding normally is required only to establish a prima facie case by proving entry of the order, actual or constructive knowledge in the obligor, and the obligor's noncompliance. [Dyer v. Dyer, 92 Ariz. 49, 373 P2d 360 (1962); Svehaug v. Svehaug, 16 Or.App. 151, 517 P2d 1073 (1974); In re Marriage of Vanet, 544 SW2d 236, 246 (Mo.App. 1976).] Once the moving party overcomes this initial hurdle, the burden shifts to the obligor to show facts which will excuse his noncompliance. If the defense is inability to pay, he or she has the burden of proving that it was genuine and not occasioned by his or her own acts. [Brooks v. Brooks, 286 SE2d 669 (S.C. 1982); Ex Parte Almendarez, 621 SW2d 664 (Tex.Civ.App. 1981); Hess v. Hess, 87 Ill.App.3d 947, 409 NE2d 497 (1980); Blair v. Blair, 600 SW2d 143 (Mo.App. 1980); Parker v. Parker, 97 Idaho 209, 541 P2d 1177 (1975); Stafford v. Stafford, 27 Misc.2d 9, 203 NYS2d 935 (1960); State ex rel. Blackwell v. Blackwell, 179 P2d 278, 181 Or. 157 (1947); Vanet, supra, p. 245; 53 ALR2d 591; Chapter 7, infra.] Few appellate courts have

analyzed the type of evidence an obligor would have to submit to the court to make a defense of inability to pay. One excellent analysis appears in the case of Ex Parte Hennig, 559 SW2d 401 (Tex.Civ.App. 1977), as follows:

> In order to establish the inability to pay, the relator must show not only that he lacks the financial resources to pay the delinquency, but also that he knows of no other source from which the sum might be obtained. This ultimate fact can be established by proof of the following:
>
> (1) That the relator lacks sufficient personal or real property which could be sold or mortgaged to raise the needed sum; and
>
> (2) That the relator has unsuccessfully attempted to borrow the sum from financial institutions such as banks, credit unions, and loan companies; and
>
> (3) That the relator knows of no other source, including relatives, from whom the sum could be borrowed or otherwise secured. (Citation omitted.)
>
> Of course these are only conclusory elements which must be supported by specific evidence according to the facts of each particular case.[36]

When the obligor presents evidence that the noncompliance was financially justified, some States require the moving party to present evidence to the contrary. [Thomas v. Thomas, 406 So2d 939 (Ala. 1981); Henderson v. Henderson, 55 N.C.App. 506, 286 SE2d 657 (1982).]

The existence of the valid support order can be established by asking the court to take judicial notice of the support order contained in the court file. [Ex Parte Ah Men, 19 P 380, 77 Cal. 198 (1888); State ex rel. Cook v. Cook, 64 NE 567, 66 Ohio St. 566, 53 ALR2d 597 (1902); but see People in the Interest of F.S.B., 640 P2d 268 (Colo.App. 1981).] The obligor's knowledge of the order usually can be established by reference to the support order itself, which often will note the presence of the obligor or his or her attorney at the hearing that produced the order. If the order does not contain such a reference, the court file should contain the court clerk's certificate of mailing, which creates a rebuttable presumption of service. [Jones v. Jones, 91 Idaho 578, 428 P2d 497 (1967).] In some States, such as California, it is customary to serve the obligor in person, if necessary. Personal service creates a presumption as well. [Cal.Civ.Proc. Code Section 1209.5.] Nonpayment can be established by entering the court clerk's payment record into evidence, if available. If not, it might be necessary to call the obligee, or a representative from the IV-D agency, to testify as to the obligor's noncompliance. It also might be possible to substitute an affidavit in lieu of live testimony. [Bowden v. Bowden, 198 Tenn. 143, 278 SW2d 670 (1955); Catron v. Catron, 577 P2d 322 (Colo.App. 1978).]

When a dispute arises as to whether payments were or were not made as ordered, the obligor generally must plead satisfaction as an affirmative defense and prove the defense by substantial evidence. [Huchteman v. Huchteman, 557 P2d 427 (Okla. 1976); Karleskint v. Karleskint, 575 SW2d 845 (Mo.App. 1978); State ex rel. Fry v. Fry, 559 P2d 1293, 28 Or.App. 403 (1977); 53 ALR2d 591.] This rule is justified because the evidence of payment is usually in the sole possession of the obligor; placing the burden on the obligee on this issue would force him or her to prove a negative.

Punishment

Punishment for civil contempt must be remedial and coercive. As such, the purpose of the punishment is not punishment per se, nor is it to protect, preserve, and vindicate the authority of the court and the power of the law. Criminal contempt proceedings (discussed below) further these purposes.

Because punishment in civil contempt proceedings must be remedial and coercive, any imprisonment or fine is improper unless its purpose is to benefit the obligee and it allows the obligor to purge himself or herself by complying with clearly stated and attainable requirements. The obligor must have a present ability to comply with those requirements. [Gompers v. Buck Stove Co., supra; In re Marriage of Hartt, 603 P2d 970 (Colo.App. 1979); In re Marriage of Crowley, 663 P2d 267 (Colo.App. 1983); Kramer v. Kelly, 401 A2d 799 (Pa.Super. 1979); Long v. Long, 421 A2d 822 (Pa.Super. 1980); Eliker v. Eliker, 295 NW2d 268 (Neb. 1980); Ponder v. Ponder, 438 So2d 541 (Fla.Dist.Ct.App. 1983); Walker v. Walker, 375 NE2d 1258 (Ohio 1978); Smith v. Smith, 451 So2d 945 (Fla. 1984); Rutherford v. Rutherford, 296 Md. 347, 464 A2d 228 (Md.Ct.App. 1983).] A few courts have held that imprisonment is proper in civil contempt when the obligor intentionally or willfully placed him or herself in a financial condition that makes compliance impossible. [State ex rel. Stanhope v. Pratt, 536 SW2d 567, 575 (Mo. 1976); Ziegler v. Butler, 410 So2d 93 (Ala.Civ.App. 1982).] These cases are difficult to reconcile with the three limitations set forth above, unless the court fashions its purgation requirements to allow the obligor to purge himself or herself by something other than payment. Otherwise, the obligor would not "carry the keys to the jailhouse in his own pocket."

Punishment in civil contempt proceedings tends to fall into three categories: (1) incarceration; (2) coercive fines, and (3) compensatory fines. [Doyle v. London Guarantee & Acc. Co., 204 US 599, 27 SCt 313, 51 LEd 641 (1907); United States v. United Mine Workers of America, 330 US 258, 67 SCt 667, 91 LEd 884 (1946).] While all three are conceptually appropriate to enforce child support orders, most courts rely on incarceration alone. Generally, the fine or imprisonment continues until the obligor complies with the court's purgation requirements. Because this type of punishment conceivably could be a life sentence, many courts routinely place a maximum on the punishment by "sentencing" the obligor to a fixed term that the obligor can end at any time by complying with the purgation requirements. Such a practice has been upheld in at least one appellate decision. [Johnson v. Johnson, 319 P2d 1107, 1111 (Okla. 1957).] A fixed term without possibility of purgation is clearly not proper. [Hess v. Hess, 43 Ill.Dec. 882, 409 NE2d 497 (Ill.App. 1980).]

Purgation Requirements and Commitment

The purgation requirements must be set forth in the judgment and commitment order in clear language and detail such that the obligor knows precisely what must be done in order to avoid the punishment. Otherwise, the judgment and commitment are void, and the obligor must be released. [In re Quevado, 611 SW2d 711 (Tex.Civ.App. 1981); Vokolek v. Carnes, 512 SW2d 112 (Mo. 1974).]

Within these limits, the court's discretion in tailoring the purgation requirements to fit the case at hand is very broad. The U.S. Supreme Court has ruled that "the measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." [McComb v. Jacksonville Paper Co., 336 US 187, 93 LEd 599, 605 (1948); see also Hopp v. Hopp, 156 NW2d 212, 216 (Minn. 1968); 85 ALR3d 897.] Civil contempt is an equitable remedy. Therefore, the court has full equitable power to order the obligor to carry out any act that he or she has the present ability to perform.

If the contemnor has the ability to borrow from friends and relatives, the court can require that the obligor do so in order to purge. [Ex parte Hennig, supra.] If the obligor has the ability to sell or mortgage property in order to make an arrearage or current support payment, the court may require him or her to do so, even though the property involved would be exempt from execution. [Casey v. Casey, 175 Or. 328, 153 P2d 700 (1944); Sheridan v. Sheridan, 33 Cal.App.3d 995, 109 Cal.Rptr. 466 (1972); Johnson v. Johnson, 413 A2d 1115 (Pa.Super. 1979).] The court even may require the obligor to make a direct transfer of personal property. [In re Marriage of Thompson, 96 Cal.App.3d 621, 158 Cal.Rptr. 160 (4th Dist. 1979).] Where the obligor is unemployed, the court may include a "seek work" order in the purgation requirement and require the obligor to report periodically to the court any efforts to find employment. [Dennis v. Wisconsin, 117 Wis.2d 249, 329 NW2d 272 (1984).] Many States allow for a commitment order, which requires the obligor to spend nights and weekends in jail, but which allows him or her to be released each day to go to work. [Hopkinson v. Hopkinson, 470 A2d 981 (Pa. 1984).]

Many courts will allow the obligor a short time period to accomplish the purgation requirement prior to invoking the commitment order. For instance, a court's judgment and order might read:

> Obligor found in contempt of this court for failure to make x payments on x dates; obligor found to have had the ability to make payments as they fell due; obligor found to have an interest in certain (real or personal) property upon which he may borrow such sums as are necessary to comply with the order of this court; obligor adjudged in contempt and committed to the county jail until such time as (s)he pays $x to the clerk of court; execution of commitment suspended until x date to allow obligor to obtain the funds necessary to comply with this order and judgment.

Judges like to use orders such as this one because they recognize that it is the threat of jailing more than the jailing itself that provides the incentive to pay. By allowing the obligor a period of time to comply with the purgation conditions, the end can be attained without the need for the obligor to serve time. The obligor does not risk losing his or her job; the county does not have to incur the cost of housing a prisoner, and the obligor's task in raising the money is logistically easier.

This technique has caused some problems, however. If the order contains the wrong language, the commitment is tenuous. In Mayer v. Mayer, 532 SW2d 54, 60 (Tenn.App. 1975), a Tennessee appellate court overturned a contempt judgment that contained a "suspended sentence," holding that no such thing exists. In Gross v. Gross, 557 SW2d 448, 453 (Mo.App. 1977) and In re Vanet, 544 SW2d 236, 247 (Mo.App. 1976), Missouri appellate courts held that probation and civil contempt are conceptually incompatible, and any contempt judgment providing for imprisonment and probation conditioned on compliance is void. [See Exhibits 6.8 and 6.9.]

Another problem with delayed enforcement is procedural. When the date set in the contempt judgment passes prior to execution of the commitment order by the sheriff, the obligor may have a right to another hearing on the issue of whether he or she has complied with the purgation requirements. [Greene v. District Court of Polk County, 342 NW2d 818 (1983).] If this is true, then the initial hearing on the show cause order is essentially useless.

Civil contempt is an effective remedy only where the obligor can be brought before the judge immediately after a payment is missed, and only if the judge is willing to back up the support order with jailing or fine. If caseload pressures keep noncomplying obligors out of court, or if the judge is unwilling to incarcerate obligors who are able to pay, then contempt proceedings can actually be counterproductive. The same is true for specific cases where the obligor is destitute and an appropriate equitable remedy does not present itself. Unless the court can impose a sanction, the obligor's experience in the contempt process merely teaches him or her that the court's bark is worse than its bite. In States which allow retroactive modifications, a contempt proceeding brought before a weak or powerless judge merely allows the obligor an opportunity to file a countermotion for a downward modification. Clearly, civil contempt should be only a last resort, and only for cases that exhibit favorable facts.

CRIMINAL CONTEMPT

A few States use criminal contempt to enforce child support obligations. The use of criminal over civil contempt can be imposed by statute [e.g., Cal.Civ.Proc. Sections 1209, 1209.5] or the practice can evolve naturally. Criminal contempt protects, preserves, and vindicates the authority of the courts as society's final arbiter of disputes. [Teefey v. Teefey, 533 SW2d 563, 566 (Mo. banc 1976); Kramer v. Kelly, supra; Crowley v. Crowley, 663 P2d 267 (Colo.App. 1983); Gibson v. Gibson, 15 Cal.App. 943, 948 (1971).] The distinction is crucial. While the same act might give rise to both civil and criminal contempt charges, each confers distinct procedural rights. A strictly penal sanction may be imposed only where the defendant is provided the essential procedural protections required by due process. [Kramer, supra, Murray v. Murray, 587 P2d 1220 (Hawaii, 1978); Sword v. Sword, 59 Mich.App. 730, 229 NW2d 907 (1975).] These rights may include:

- Notice of the charges as in criminal cases [In re Hinman, 239 Cal.App.2d 845 (1966)]
- Appointed counsel, after an indigency hearing [Sword, supra]
- A jury trial [Sword, supra, but see In re Morelli, 11 Cal.App.3d 819 (1970)]
- Freedom from default judgment [Ex Parte Johnson, 669 SW2d 869 (Tex.App. 1984)]
- A verdict of innocent unless guilt found beyond a reasonable doubt [Quezada v. Superior Court, 171 Cal.App.2d 528 (1959)]
- Protection from self-incrimination [Ex Parte Gould, 990 Cal.360 (1983); Oliver v. Superior Court, 197 Cal.App.2d 197 (1961); Sword, supra]

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- Burden of proof on prosecution [Masonite Corp. v. International Woodworkers of America, 206 So2d 171 (Miss. 1968); but see Skinner v. Ruigh, 351 NW2d 182 (Iowa 1984)]
- Trial before an impartial judge, that is, one who is not familiar with the facts of the case [Sword, supra; In re Marriage of Neiswinger, 467 NE2d 43 (Ind.App. 1984)]
- Proof of contempt by independent evidence (i.e., extrajudicial statements of the obligor cannot be introduced until all elements of contempt are otherwise proven). [People v. Wong, 35 Cal.App.3d 812 (1973).]

Clearly, a criminal contempt proceeding is considerably more complicated than a civil contempt proceeding. The initiation of the proceeding may require a more formal notice than is provided the civil contemnor in the motion and order to show cause, although a formal information or indictment is not necessary. The possibility of an indigency hearing, a jury trial, and a change of judge makes the process potentially a very long one. The evidentiary hurdles are difficult to overcome without knowledgeable witnesses.

Despite these drawbacks, there are occasions when criminal contempt is useful. Where an absent parent has been charged with civil contempt on numerous occasions, but regularly frustrates the action by paying the arrearage on the day of the show cause hearing and never making payment voluntarily, a criminal contempt action may change his or her attitude about compliance. [State ex rel. Fry v. Fry, 559 P2d 1293 (Ore. 1977); Teefey, supra; United States v. United Mine Workers of America, 330 US 258, 299, 67 SCt 667; 91 LEd 899 (1946).] Furthermore, criminal contempt may be the only available remedy to punish an obligor who has made himself or herself unable to pay by quitting a job or taking one at a much lower salary. [See Murray, supra.]

CRIMINAL NONSUPPORT

Most States have passed statutes making the failure to support one's children a criminal offense. In many States, the attorneys who establish and enforce child support obligations in civil court are district or prosecuting attorneys who also have discretion to file criminal charges against an absent parent when appropriate. Criminal nonsupport charges are appropriate in instances where civil remedies are not sufficient. Indeed, one Florida appellate court has held that criminal charges should not be used if alternate civil remedies are available. [Bryne v. State, 362 So2d 812 (Fla.App. 1979).]

This decision is perhaps the culmination of a process. Child support enforcement has turned away from criminal style remedies in the recent past, as IV-D administrators learned that an emphasis on summary civil remedies such as wage withholding and tax refund interceptions produced higher overall collections. Nevertheless, felony nonsupport proceedings can still prove useful in some instances. Where an obligor has fled the jurisdiction or is avoiding service of civil process, the filing of criminal charges will allow issuance of an arrest warrant. Once the warrant is issued, the obligor is likely to be picked up in the future, because felony warrants show up on police computers all across the country. If stopped for a minor traffic violation, the obligor will be arrested on the felony nonsupport warrant, and extradition is possible. Similarly, where the obligor somehow is avoiding all civil remedies, and it would be useful to change his or her attitude about the importance of voluntary compliance, a criminal nonsupport charge can be very effective.

Pleadings

In most States, all of the normal rules of criminal procedure apply to felony nonsupport actions. The action is initiated by filing a criminal complaint, information, or indictment, depending on local practice. This document is presented to the judge who issues a summons or warrant. At least one old State court decision holds that if the charge is a felony or if "hard labor" is a possible sentence, a grand jury hearing must be held to obtain an indictment. [State v. Arris, 121 Me. 94, 115 A 648 (1922).] The initial pleading must allege all elements of the crime in a manner which allows the defendant to understand the charge and prepare a defense. [People v. Scholl, 339 Ill.App. 7, 88 NE2d 681 (1949); Gravitt v. Commonwealth, 232 Ky. 432, 23 SW2d 555 (App. 1930).]

One issue can prove troublesome at the filing stage--the location of the crime of nonsupport or abandonment. If both the defendant-parent and the children reside in the same jurisdiction, there is no issue. Where they live in different States or judicial districts, the issue is crucial. There is case law holding that the crime occurs in the place where the children reside; there is case law holding that the crime is occurring whenever the defendant-parent is at any given point in time, and there is case law holding that the action can be filed in either jurisdiction. [See Anno., 44 ALR 889.]

After accepting the complaint, the court usually issues a summons to the defendant-parent, asking him or her to come to court for the arraignment. Occasionally, the court will issue a warrant for the defendant's arrest, especially if he or she has been uncooperative. At this hearing, the court will read the charge to the defendant, advise the defendant of his or her rights, determine whether the defendant requests and qualifies for appointed counsel, set a date for the preliminary hearing, and, occasionally, set bail. At the preliminary hearing, the defendant will be asked to enter a plea. If the charge is a misdemeanor, the arraignment and preliminary hearings often are combined into one proceeding.

Elements

The elements of criminal abandonment or nonsupport vary from State to State, depending on statutory language. Typical elements of the offense are as follows:

- Abandonment, desertion, and nonsupport
- A culpable state of mind
- Ability to provide support
- The children are likely to become a public charge as a result of defendant's nonsupport.

All States include the first two elements in the list of items that the prosecutor must allege and prove. Abandonment, desertion, and nonsupport are fairly straightforward concepts and have not produced much appellate case law. In Tutt v. State, 310 SE2d 14 (Ga.App. 1983), a Georgia appellate court held that nonsupport could be proved by placing into evidence the ledger card from the probation office (chronicling the defendant's noncompliance with a civil support order).

The second element--culpable mental state--has produced quite a bit of case law. In States that have adopted the Model Penal Code, the standard definition of culpability applies to criminal nonsupport--"intentionally, knowingly, recklessly, or with criminal negligence." [State v. Gartzke, 592 P2d 1040, 39 Or.App. 463 (1979).] Other courts variously define the necessary state of mind as:

- Willful [Pirie on behalf of Law v. Law, 460 NYS2d 395 (N.Y.App.Div. 1983); Bennett v. State, 109 Tex.Crim. 237, 4 SW2d 62, 10 SW2d 1117 (1928) (evil intent or design); Commonwealth v. Wright, 433 A2d 511 (Pa.Super. 1981) (conscious object to withhold support); Burris v. State, 382 NE2d 963 (Ind.App. 1978) (deliberate or perverse design, malice, or an intentional or deliberate breach of duty of support)]
- Set purpose or design [Mercardo v. State, 86 Tex.Crim. 559, 218 SW 491 (1920)]
- Purposeful [Page v. State, 160 Miss. 300, 133 So 216 (1931); State v. Hayden, 224 N.C. 779, 32 SE2d 333 (1944); Bohannon v. State, 271 P2d 739 (Okla.Crim. 1954)];
- Absence of legal excuse or justification [State v. Russell, 73 Wash.2d 903, 442 P2d 988 (1968); State v. Richmond, 683 P2d 1093 (Wash. 1984)]
- Intentional [State v. Moran, 400 So2d 1359 (La. 1981)].

There is little agreement among the States as to how the third element is interjected into the action. In some States, ability to provide support is an element of the prosecution's case which must be proved beyond a reasonable doubt, just like the other elements. [State v. Moran, supra., Peacock v. State, 362 So2d 174 (Fla.App. 1978).] In other States, inability to pay is an affirmative defense, similar to diminished responsibility or insanity in other criminal actions. Switching the burden of coming forward with the evidence on this issue usually is justified by noting that the relevant evidence is peculiarly within the defendant's knowledge. [Commonwealth v. Wright, supra; Commonwealth v. Hussey, 14 Mass.App. 1015, 441 NE2d 783 (1982); State v. Brown, 5 Ohio App.3d 220, 451 NE2d 1232 (1982); State v. Wright, 4 Ohio App.3d 291, 448 NE2d 499 (1982).] At least one State supreme court has held that such a practice violates the defendant's right to be presumed innocent unless proven guilty. [State v. Johnson, 412 So2d 602 (La. 1982); State v. Kiper, 408 So2d 1312 (La. 1982).]

The fourth element is not required in all States. [Crawford v. State, 166 Ga.App. 632, 305 SE2d 403 (1983).] In the States where it is necessary to prove that the children were in dire straights as a result of the defendant's lack of support, various forms of proof have been approved by the courts. In Commonwealth v. Hussey, supra, the court held that proof that the children had to turn to public assistance in order to survive was sufficient to meet the element. In Turner v. State, 343 So2d 591 (Ala. 1977), the Alabama Supreme Court held that "need," as it is used in Alabama criminal nonsupport statute, does not amount to "destitute or necessitous circumstances."

Defenses

Defendants may try to deflect the nonsupport charge with a number of defenses. Because of the different burden of proof and procedure in criminal cases, each defense affects the case differently than the same defense would in a civil case.

Inability to pay. The definition of this defense should track the definition used in civil contempt cases, except that the measure is not necessarily the amount that should have been paid under an existing court order. Ability to pay will be judged according to the needs of the children during the period and the defendant's ability to earn; lack of means alone will not support the defense. [State v. Brown, supra.]

Child living apart from obligor without obligor's consent. This defense generally has been rejected. [See Bennefield v. State, 4 SE 869 (Ga. 1888); Moore v. State, 57 SE 1016 (Ga. 1907); People v. Howell, 214 Ill.App. 372 (1919); Comm. v. Donovan, 200 SW 1018 (Ky. 1920); State v. Sutcliffe, 25 A 654 (R.I. 1892); Beilfuss v. State, 126 NW 33 (Wisc. 1910); Bowen v. State, 46 NE 708 (Ohio 1897).]

Child supported by third party or of independent means. This is a frequent defense. In States that require the prosecution to allege and prove that the children were needy due to the defendant's nonsupport, the defense is virtually automatic. If the children were cared for by a third party, of if they or the custodial parent had independent means, a criminal charge may not be possible. Other State courts often have rejected this defense. [See State v. Knetzer, 3 Kan.App. 673, 600 P2d 160 (1979); People v. Yate, 298 P 961 (Cal. 1931); People v. Frazier, 261 P2d 1071 (Cal. 1972).]

Nonpaternity. Nonpaternity is only properly a defense when the issue has not been decided in previous action. (See Chapter 7 for a discussion of the res judicata effects of a paternity judgment, infra.) If there is no existing paternity finding and no strong presumption of paternity, paternity is an element of the prosecution's case. [See Nordgren v. Mitchell, 716 F2d 1335 (C.A. Utah 1983); People v. Askew, 30 Ill.Dec. 777, 393 NE2d 1124 (1979); State v. Rawlings, 38 Md.App. 479, 381 A2d 708 (1978).] Thus, it becomes a defense only in situations where the defendant and the mother were married and separated without obtaining a divorce, or where they obtained a divorce in which the paternity issue was not decided. Where the defense is properly interjected, the evidentiary issues should track those in a normal civil paternity case. (See Chapter 10, infra.)

Vagueness of the statute. Occasionally, a defendant will challenge the language in the statute that defines the offense, arguing that it is unconstitutionally vague, and that a parent is not sufficiently notified of the behavior he or she should avoid in order to be blameless. Such an argument has been upheld on occasion. [See State v. Richmond, 683 P2d 1093 (Wash. 1984).]

Gender bias in statute. Many of the existing criminal nonsupport statutes were enacted many years ago, when the principal or exclusive duty of support rested on the father. As a result, many of the statutes provide only that the male parent may be held criminally liable for nonsupport. Several courts have set aside convictions based on this gender bias. [See State v. Fuller, 377 So2d 335, 14 ALR4th 711 (La. 1979); People v. Lewis, 107 Mich.App. 297, 309 NW2d 234 (1981).] Other courts have opted to read the word "father" in the statute as though it says "parent," to avoid the constitutional problem. [See, for example, Comm. v. Wright, 433 A2d 511 (Pa.Super. 1981).]

Selective prosecution. One defendant recently challenged a conviction on the basis that the statute created a classification that discriminated against certain racial and ethnic groups, and against poor defendants. The California appellate court held that the statute's classifications did not result in or promote selective prosecutions, and rejected the defense. [See People v. Gregori, 192 Cal.Rptr. 555 (Cal.App. 4th Dist. 1983).]

Evidence

The evidence in a criminal nonsupport action should not differ markedly from that in a civil contempt case, unless the defendant asserts nonpaternity as a defense. In most cases, the most important issues will be the defendant's state of mind, his or her financial condition during the relevant period, and the needs of the children. Many courts have held that a culpable mental state can be inferred once the prosecution establishes neglect. [See Comm. v. Wright, supra; Dyer v. State, 52 P2d 1080 (Okla.Crim. 1935); State v. Faulkner, 182 N.C. 793, 108 SE 756 (1921).] In California, once the prosecution shows the omission to provide support, the burden of proof shifts to the defendant to prove that the omission was not willful or excusable. [People v. Temple, 20 Cal.App. 540, 97 Cal.Rptr. 794 (1971).]

Ability to pay may be more difficult to prove in a criminal case than in a civil case because the defendant cannot be forced to testify (except in those States where inability to pay is an affirmative defense). Presumably, records of the defendant's employer, or of the State revenue or employment security agency could be submitted. If that fails, perhaps friends or relatives of the defendant could be called to testify regarding the spending habits of the defendant during the relevant period.

The needy condition of the children can be proved with the testimony of the custodial parent or, for an AFDC case, by placing the welfare agency's grant history into evidence. [See Comm. v. Hussey, supra.]

Punishment

Once the defendant is convicted, the court must fashion a form of punishment that is severe enough to make the defendant change his or her behavior in the future, and yet which does not make it impossible for the defendant to earn a living. The court usually can achieve these ends by sentencing the defendant to an appropriate jail term (called "shock detention") and then placing the defendant on probation. The conditions of probation normally will require the defendant to pay a certain amount of child support, and perhaps take other action to make it less likely that he or she will not repeat the offense (i.e., enter a drug or alcohol rehabilitation program). Many appellate courts have upheld a trial court's authority to enter a permanent support order as a condition of probation as well. [See Murphy v. State, 171 Ark. 620, 286 SW 871 (1926); Martin v. People, 69 Colo. 60, 168 P 1171 (1917); State v. Waller, 90 Kan. 829, 136 P 215 (1913); Poindexter v. State, 137 Tenn. 386, 193 SW 126 (1917).] However, in some States the trial court may only enforce a current support order for the maximum period a defendant can be placed on probation, which will vary with the length of the sentence imposed.

In Los Angeles County, California, the District Attorney's Office uses the following guidelines to recommend sentences in misdemeanor cases:

- The defendant should be placed on summary probation for 2 years.
- A fine should not be imposed.

- The court should enter a current support order based on the guidelines used to set orders in civil cases.
- The court should consider the defendant's ability to repay public assistance paid to the family during the period of the crime.
- A wage assignment should be effected.
- Jail time should be recommended only where necessary.[37]

In many jurisdictions where the court deems jailing to be appropriate or necessary, it is possible for the defendant to serve the sentence on weekends and evenings in order to continue working.

TAX REFUND INTERCEPTIONS

One of the most effective collection remedies in recent years has been the interception of Federal and State income tax refunds owing to delinquent absent parents. In tax year 1984 (tax processing year 1985), 1,287,717 cases were submitted to the Internal Revenue Service (IRS); the IRS certified 1,083,856 of these. By the end of the year, 489,366 refunds had been intercepted, totalling almost $240 million in gross collections. Complete figures for tax year 1984 can be found in Child Support Enforcement: 10th Annual Report to Congress for the Period Ending September 30, 1985, to be published by DHHS in 1986. As of April 1986, 1,661,000 cases had been submitted for offset processing from tax year 1985. Of these, 227,000 were for non-AFDC cases and 1,434,000 were for AFDC cases.

States have reported similar successes intercepting State tax refunds. For instance, in 1981, Oregon collected $3 million. Congress responded in 1984 by enacting 42 USC 666(a)(3), which requires all States to enact and implement procedures under which State tax refunds can be intercepted for both AFDC and non-AFDC cases.

Federal Tax Refund Interception Program

Section 2331 of P.L. 97-35 (the Omnibus Budget Reconciliation Act of 1981) added new section 464 and new paragraph 454(18) to Title IV-D of the Social Security Act [42 USC 664 and 654(18), respectively] and amended section 6402 of the Internal Revenue Code [26 USC 6402(c)]. The combination of these statutory amendments created a new remedy by which an absent parent's Federal income tax refund could be reduced by the amount of any arrearage that has been assigned to a State and certified to the IRS for setoff. Section 464 was revised by the Child Support Enforcement Amendments of 1984 to extend use of the remedy to collection of past-due support in non-AFDC and foster care cases. This revision is effective for refunds payable after December 31, 1985, and before January 1, 1991.

Intrastate procedure. 45 CFR 303.72 governs use by the States of the Federal tax refund setoff remedy. Under the 1985 revisions, there are separate qualifying criteria for AFDC and non-AFDC cases. For AFDC cases, the amount of past-due support must exceed $150 and must represent a delinquency of at least 3 months. For non-AFDC cases, the support delinquency must be entirely child support (no spousal support component), must exceed $500, and must not represent support previously assigned to the State. In addition, the State may opt to consider for setoff in non-AFDC cases only the delinquency that has accrued since the State began to enforce the support order. For both types of cases, the IV-D agency must possess a copy of the support order and all subsequent modifications and a copy of the payment record or an affidavit signed by the custodial parent attesting to the amount of support owed; in non-AFDC cases, the record must include, additionally, the custodial parent's current address. Also, before submitting the case to OCSE, the IV-D agency must verify the accuracy of the absent parent's name, Social Security number, and delinquency and check its records to determine whether an AFDC or foster care arrearage exists.

Each State IV-D agency must submit annually to OCSE a magnetic tape identifying cases for potential refund interception. The tape must separate AFDC and foster care cases from non-AFDC cases. OCSE reviews each submittal to determine whether the above criteria have been met. If all is in order, OCSE transmits the submittal to the IRS. The IV-D agency must inform OCSE of any cases to be deleted or delinquencies to be decreased.

Two notices must be provided to the absent parent. OCSE, or the IV-D agency if it elects to do so, must send a written advance notice to the absent parent, informing him or her of the right to:

- Contest the State's determination that past due support is owed or the amount of past-due support
- An administrative review by the submitting State or, at the absent parent's request, the State with the order on which the referral for offset is based.

In addition, the notice must notify the absent parent of the procedures and time frame for contacting the IV-D agency to request administrative review and that, in the case of a joint return, the IRS will notify the absent parent's spouse at the time of offset regarding the steps to take to protect the nondebtor spouse's share of a joint refund. A second notice must be sent by IRS at the point the refund is intercepted.

If the absent parent responds to either notice by requesting a review, the IV-D agency must notify both the absent parent and, in non-AFDC cases, the custodial parent of the time and place of the administrative review. If the review results in a deletion of, or decrease in, the amount referred for setoff, the IV-D agency must notify OCSE promptly. If the setoff has already occurred, the IV-D agency must make any necessary refunds promptly.

Interstate procedure. In interstate cases, the submitting State must notify any other State involved in enforcing the order, both upon submittal to OCSE and upon receipt of the refund from IRS. The requirements regarding notice to the absent parent are the same as for intrastate cases. The most significant procedural change pertains to the administrative review process. The submitting State must provide the absent parent an opportunity for review. If the complaint cannot be resolved by the submitting State and the absent parent requests a review in the State with the order on which the referral for offset is based, the submitting State must notify the other State and provide all necessary information, including a copy of the order and all subsequent modifications, a copy of the payment record or the custodial parent's affidavit, and, in non-AFDC cases, the custodial parent's current address. The rendering State must schedule the review, notify both parents, conduct the review, and make a decision within 30 days of receiving the referral from the submitting State. The rendering State must notify the submitting State promptly of its decision. The submitting State is bound by the rendering State's decision, and must refund promptly any amount ruled to have been intercepted in error.

Distribution of intercepted tax refunds. Collections received by a IV-D agency as a result of a Federal tax refund interception, both for AFDC and non-AFDC cases, must be distributed as past-due support pursuant to 45 CFR 302.51(b)(4) and (5). These sections require the State to retain such amounts as are necessary to reimburse itself for public assistance paid during "any sequence of months for which it has not yet been reimbursed." This amount is shared with the Federal Government to the extent of its participation in the assistance payments. Any amount left over is to be distributed to the family. (If a State fails to submit its arrearages for offset, the non-AFDC offset goes entirely to the family. If both arrearages are submitted, the State gets its payment first.) AFDC and foster care assigned arrearages will be offset by the IRS before non-AFDC arrearages, which are not assigned.

Legal challenges. The Federal tax refund interception program has been challenged in State and Federal Courts, primarily on the following three grounds:

- That due process requires a predeprivation notice and opportunity for hearing [See Nelson v. Regan, 560 F.Supp. 1101 (D.Conn. 1983); Marcello v. Regan, 574 F.Supp. 586 (D.R.I. 1983); Jahn v. Regan, 584 F.Supp. 399 (E.Mich. 1984); Keeney v. Secretary of the Treasury, No. 83-2427, (C.Cal. 10/11/83); Presley v. Regan, No. 83-CV-630 (D.N.Y. 3/11/85)]

- That the interception of joint refunds, without adequate notice to the nondebtor spouse regarding the procedure he or she must follow to protect his or her share of the refund, violates due process [See Coughlin v. Regan, 584 F.Supp. 697 (D.C.Maine 1984); Jahn v. Regan, supra]

- That the "earned income credit" portion of a Federal tax refund is not an "overpayment" and thus is not eligible for setoff. [See Sorenson v. Secretary of the Treasury, 752 F2d 1433 (C.A. 9, 1985) (No. 84-1686); Rucker v. Secretary of the Treasury, 751 F2d 351 (C.A.10, 1984), aff'g 555 F.Supp. 1051 (D.Colo. 1983); Nelson v. Regan, supra.]

The procedural modifications effected by the 1985 Federal regulations appear to alleviate the two due process concerns, i.e., notice and hearing procedures. The earned income credit decisions have tended to be adverse to the Child Support Enforcement Program, but the issue is presently before the U.S. Supreme Court.

State Tax Refund Setoff Procedures

The 1984 Amendments require States to have laws providing for State tax refund offset. Most States that have an income tax have indeed enacted setoff statutes, authorizing the State revenue agency to withhold tax refunds due individuals who owe any liquidated debt to any State agency. The procedure is similar to the Federal setoff procedure, with the State revenue agency performing a role similar to that of IRS.

A broadly based statutory and constitutional challenge to the Oregon setoff procedure was mounted by the Oregon Legal Services Corporation and rejected by the

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Oregon Court of Appeals in Brown v. Lobdell, 36 Or.App. 397, 585 P2d 4 (1978). The Maryland statute was held to violate due process (for lack of predeprivation hearing) in McClelland v. Massinga, 600 F.Supp. 558, 11 FLR 1132 (D.Md. 1984).

BONDS AND OTHER SECURITY

The Child Support Enforcement Amendments of 1984 require States to enact and use "procedures which require that an absent parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such absent parent of the proposed action and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State)."[38] The remedy need not be applied in all cases, but the State must determine that each case is not appropriate using guidelines generally available within the State which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations.[39]

A majority of States have enacted legislation authorizing courts to require a noncomplying obligor to post a compliance bond or provide other security. Presumably, now that States will be turning to expedited judicial and administrative processes for enforcement of support obligations, the authority to require bonds or other security will be conferred on judge surrogates as well.

The remedy may be combined conveniently with a civil contempt proceeding. Where the obligor is found in contempt, the court might order that he or she post a bond or give over title to real or personal property to secure future compliance. Upon noncompliance, the security is liquidated at the direction of the court, usually ex parte, and the proceeds are applied to the support obligation. In many States, due process no doubt would require that notice and a hearing (pre- or postliquidation) be provided to determine whether the obligor did or did not comply and to allow him or her to assert any available defenses. A thorough statute will set forth a clear procedure.

In the past, the remedy has been more theoretical than actual. Bonding companies have been unwilling to provide what is in essence "child support insurance," perhaps due to the low level of compliance. The passage of Federal legislation is not likely to change this attitude. Therefore, it is more effective to seek security only where a specific piece of property has been identified that, for one reason or another, is not appropriate for seizure by way of execution. Where the obligor's personal interest in the property is high, financial interest is low, and storage and sale costs are likely to be high, asking the court to order the obligor to put the property up as security would encourage future performance. A good example of such property would be a motorcycle or a boat. The obligor may get sufficient pleasure out of the item to make it worth more than the amount of support he or she might have to pay to comply with the order.

It also might be possible to convince a court to order a high income obligor to set up a trust out of which the support payments could be made.

EQUITABLE REMEDIES

Most State courts that sit in child support cases possess equity jurisdiction. If equity power is not specifically provided for by statute, case law often can be found to support the use of equitable remedies to enforce child support obligations. Indeed, contempt is often referred to as an equitable remedy. Two other equitable remedies that can prove useful are ne exeat and receiverships.

Ne Exeat

The writ of ne exeat issues from a court of equity to restrain a person from going beyond the limits of the jurisdiction until he has satisfied the movant's claim, or has given bond for his appearance or for satisfaction of the court's earlier decree.[40] The writ existed at common law, so many courts have held that it is available in domestic relations cases even in the absence of statutory authority. [Lamar v. Lamar, 123 Ga. 827, 51 SE 763 (1905); Anderson v. Anderson, 315 Ill.App. 380, 43 NE2d 176 (1942); Nixon v. Nixon, 39 Wis.2d 391, 158 NW2d 919 (1968); Bronk v. State, 43 Fla. 461, 31 So. 248 (1901); Cohen v. Cohen, 319 Mass. 31, 64 NE2d 689 (1946).]

The purpose of the writ is to restrain an individual from leaving the jurisdiction, so it generally requires an allegation and proof that the individual is about to leave. [Aiken v. Aiken, 81 So2d 757 (Fla. 1955).] The court holds a hearing ex parte, similar to the hearing held in an injunction proceeding. [McGee v. McGee, 8 Ga. 295, 8 ALR 330 (1850).] If granted, the court may order the sheriff to apprehend the obligor. After the obligor is brought into court, a hearing is held to determine the amount of the appearance bond to be filed. The bond may be set to ensure the obligor's appearance at a hearing required by another civil enforcement remedy, or perhaps, to ensure his or her compliance with the order after he or she leaves the jurisdiction. [See Gibson v. State, 220 Miss. 39, 70 So2d 30 (1954).]

Receivership

A receiver is an individual appointed by the court to take the property or funds of a party to an action, generally pending the outcome of the action. In domestic relations cases, receivers usually are used during the pendency of a divorce action where there is some danger that one of the parties will squander or waste the property or funds. There is likewise some authority for their use during the enforcement stage, at least where the court that entered the order possesses equity powers.[41] The State of Michigan has a receivership statute specifically designed for child support enforcement.[42]

Receivers are appropriate for use against self-employed absent parents who have an identifiable business. The court appoints a receiver to operate a business on behalf of the obligor. The proceeds of the business, less the receiver's expenses and fee, are turned over to the court for application on the child support obligation.

Receivership is an extreme remedy and one that asks the court to use its equity powers. As a result, if an available legal remedy exists, the court is well within its rights to demand that the legal remedy be tried first. [Fincham v. Fincham, 174 Kan. 199, 255 P2d 1018 (1953).] In practice, the remedy should not be as drastic as it first appears. Most self-employed absent parents will be quick to make other arrangements for paying arrearages and ensuring current support.

REPORTS TO CONSUMER REPORTING AGENCIES

Pursuant to 42 USC 666(a)(7), States must have laws in effect providing procedures "by which information regarding the amount of overdue support owed by an absent parent residing in the State will be made available to any consumer reporting agency (as defined in Section 603(f) of the Fair Credit Reporting Act [15 USC 1681a(f)]) upon request of such agency." The procedure must be available in cases where the amount of overdue support exceeds $1000, subject to the State's authority to limit the remedy to appropriate cases using "guidelines which are generally available within the State and which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations."[43] "Consumer reporting agency" is defined by 15 USC 1681a(f) to mean any person who "for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties and which uses means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

45 CFR 303.105 sets forth the procedural requirements a State must meet in order to comply with 42 USC 666(a)(7). 45 CFR 303.105(d) requires the State to provide the absent parent advance notice and an opportunity to contest the accuracy of the information to be provided to the consumer reporting agency. In carrying out the notice and conflict resolution process and prior to release of information, the State must comply with its applicable due process requirements.[44] Paragraph (c) of the regulation allows the State to charge the consumer reporting agency a fee to cover the costs of providing the information.

"FULL COLLECTION" BY THE IRS

To use this remedy, the State must submit requests for a certification to the OCSE Regional Representative. [45 CFR 303.71(d)(1).] Only the State IV-D agency may request the certification. There must be a court or administrative order for support entered against the individual; reasonable efforts must have been made to collect the amount owed; the State must have an assignment of support or application for services; and the delinquency of the order cannot be less than $750. Certification will not be allowed if there has been a request for certification in the case during the previous 6 months. The State must agree to reimburse the United States for costs involved in the collection. The fee for the service is $122.50.

A State's request must include the following items:

- Sufficient information to identify the debtor, including:
  - The individual's name
  - The individual's Social Security number
  - The individual's address and place of employment, including the source of this information and the date it was last verified
- A copy of all court or administrative orders for support
- The amount owed under the support order
- A statement of whether the amount is in lieu of, or in addition to, amounts previously referred to IRS for collection

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- A statement that the agency, the client, or the client's representative has made reasonable efforts to collect the amount owed using the State's own collection mechanisms or mechanisms that are comparable

- A description of the actions taken, why they failed, and why further State action would be unproductive

- The dates of any previous requests for referral of the case to the Secretary of the Treasury

- A statement that the agency agrees to reimburse the Secretary of the Treasury for the costs of collection

- A statement that the agency has reason to believe that the debtor has assets that the Secretary of the Treasury might levy to collect the support

- A statement of the nature and location of the assets, if known.[45]

The OCSE Regional Representative reviews the request to determine whether it meets the above requirements. Next, the Regional Representative either forwards the approved request to the Secretary of The Treasury or consults with the State in an attempt to correct any deficiencies.[46] OCSE has indicated that it prefers cases in which the delinquency exceeds $2,000 and where the absent parent resides in a State other than the requesting State.

The IRS will attempt to collect the amount certified like a tax delinquency, except that:

- No interest or penalty shall be collected.

- The property exemptions contained in 26 USC 6334(a)(4), (6), and (8) do not apply.

- As much of the salary, wages, or other income of an individual as is being withheld in garnishment for the support of that individual's minor children shall be exempt from levy pursuant to a judgment entered by a court of competent jurisdiction.

- In the case of the first assessment against an individual, the collection shall be stayed for a period of 60 days immediately following notice and demand.[47]

The 60-day stay described above presumably gives the obligor the opportunity to satisfy the arrearage or contest the amount of the arrearage claimed by the State. No Federal court has jurisdiction to restrain or review the assessment or collection. However, this does not preclude the individual from bringing legal, equitable, or administrative action in the appropriate State court or administrative body to determine his or her liability for any amount assessed against him or her, or to recover any such amount collected through this procedure.[48]

MANDATORY MILITARY ALLOTMENTS

Section 465 of the Social Security Act requires allotments to be taken from the pay and allowances of any active member of the uniformed services who owes the equivalent of 2 months or more in court-ordered child support or child and spousal support payments.[49] The requirement also applies to commissioned officers of the Public Health Service, an agency within the DHHS, and of the National Oceanic and Atmospheric Administration, an agency within the Department of Commerce.

Procedure

The mandatory allotment procedure is initiated by the IV-D agency, or the court or agency that has the authority to issue an order by sending a notice to a designated official within the uniformed service involved. These officials are identified in Appendix A of the garnishment regulations issued at 5 CFR 581, the notice can be given in the form of a court order, letters, or other document. The contents of the notice vary from one branch of the service to another, but generally must:

- Provide the full name, Social Security number, branch of service, and duty station of the member who owes the support obligation
- Specify the amount of support due, and the period in which it has remained owing
- Be accompanied by a certified copy of an order directing the payment of this support issued by a court of competent jurisdiction, or in accordance with an administrative procedure that is established by State law
- Provide the full name, social security number, and mailing address of the person to whom the allotment is to be paid
- Identify any limitation on the duration of the allotment
- Identify the name and birthdate of all children for whom support is to be provided under the allotment.[50]

The notice and accompanying documents are served by certified or registered mail, or by personal service, on an official designated by regulation.

On receipt of the notice, the uniformed service must provide a copy to the absent parent and arrange for a consultation between the absent parent and a judge advocate (or a representative of the services legal staff). The consultation allows the absent parent and the judge advocate to discern what factors are involved with respect to the support obligation and failure to make payments.[51] The allotment may not be instituted until this consultation has been provided, or 30 days after the absent parent received notice of the delinquency.

The amount of the allotment is "the amount necessary to comply with the order (which, if the order so provides, may include arrearages as well as amounts for current support), except that the amount of this allotment, together with any other amounts withheld for support from the wages of the member" shall not exceed the limits established by the Federal Consumer Credit Protection Act, 15 USC 1673(b).[52]

STATUTORY EXAMINATION OF A JUDGMENT DEBTOR

One of the most frustrating situations is the self-employed absent parent or the absent parent who is paid by cash and, therefore, can continuously avoid contempt by claiming inability to pay. Without any evidence as to the obligor's income or assets, there is little the attorney can do to counter the absent parent's claim of inability to pay.

This problem apparently presents itself to numerous judgment creditors, because many State legislatures have provided all judgment creditors a remedy suited to this very situation. Typically, an execution first must be returned unsatisfied by the sheriff. The attorney, if he or she does not know of any goods or property on which levy may be made, should request the sheriff to make such a return. A motion then must be filed with the court that rendered the judgment, requesting an order requiring the defendant to appear at a time and place named in the order to be examined under oath concerning his or her ability to satisfy the judgment. Some statutes require the plaintiff to show by affidavit or otherwise that there is reasonable ground to believe that the defendant has property subject to execution or has conveyed or attempted to convey his or her property with an intent to defraud his creditors.

The court then holds a hearing to examine the defendant. The process, when successful, results in a finding that the defendant owns property which ought to be applied toward satisfaction of the judgment, as well as an award against the defendant for the costs of the examination. If the defendant is found to be actually without property, the costs are charged to the plaintiff.

Unfortunately, a Constitutional limitation may hamper the effectiveness of the remedy. In State ex rel. North v. Kirtley, 327 SW2d 166 (Mo. 1959), the Missouri Supreme Court held that a defendant could not be required to answer questions as to the ownership of property when he based his refusal upon the privilege against self-incrimination, and when the examination was, in effect, a charge of fraudulent conveyance of property, a misdemeanor. An argument could be made that the privilege applies in States where criminal nonsupport is a possibility.

FOOTNOTES

/1/ Social Security Act sec. 466(a)(8); 42 USC 666(a)(8).

/2/ Social Security Act sec. 466(b)(1); 42 USC 666(b)(1).

/3/ Social Security Act sec. 466(b)(3); 42 USC 666(b)(3).

/4/ Social Security Act sec. 466(b)(2); 42 USC 666(b)(2).

/5/ The withholding procedure must be administered by a public agency designated by the State. Presumably, the public agency may be located either in the executive or judicial branch. [Social Security Act sec. 466(b)(5); 42 USC 666(b)(5).]

/6/ 45 CFR 303.100(b).

/7/ Sec. 452.350 RSMo (Supp. 1984).

/8/ Calif.C.P. secs. 723.010 to 723.154.

/9/ H. Rep.No. 527, at p. 33.

/10/ 45 CFR 303.100(c); Social Security Act sec. 466(b)(4)(A); 42 USC 666(b)(4)(A).

/11/ Social Security Act sec. 466(b)(6)(A)(ii); 42 USC 666(b)(6)(A)(ii).

/12/ 45 CFR 303.100(d)(1)(x).

/13/ Social Security Act sec. 466(b)(6)(D); 42 USC 666(b)(6)(D).

/14/ Social Security Act sec. 466(b)(6)(C); 42 USC 666(b)(6)(C).

/15/ 45 CFR 303.100(d)(1)(iii); Social Security Act sec. 466(b)(6)(A)(i); 42 USC 666(b)(6)(A)(i).

/16/ Social Security Act sec. 466(b)(6)(B); 42 USC 666(b)(6)(B).

/17/ Social Security Act sec. 466(b)(6)(C); 42 USC 666(b)(6)(C).

/18/ 45 CFR 303.100(d)(1)(ii).

/19/ 45 CFR 303.100(d)(1)(xi).

/20/ 45 CFR 303.100(d)(2).

/21/ 45 CFR 303.100(a)(6).

/22/ Social Security Act sec. 466(b)(7); 42 USC 666(b)(7).

/23/ Social Security Act sec. 466(b)(9); 42 USC 666(b)(9).

/24/ Social Security Act sec. 466(b)(8); 42 USC 666(b)(8).

/25/ See *Sanchez v. Carruth*, 568 P2d (Ariz.App. 1977); *Padgett v. Padgett*, 472 A2d 849 (D.C. 1984); *Armour v. Allen*, 377 So2d 798 (Fla.App. 1979); *Kelzenberg v. Kelzenberg*, 352 NE2d 845 (Minn. 1984); Minn.Stat. sec. 518.64, subd. 2 (Supp. 1983); *Kruger v. Kruger*, 679 P2d 961 (Wash. 1984); *Schaffer v. Dist. Ct.*, 470 P2d 18 (Colo. 1970); *Brady v. Brady*, 592 P2d 865 (Kan. 1979); *Poe v. Poe*. 436 P2d 767 (Ore. 1967); Ore.Rev.Stat. Sec. 107.095(2) (1979); Neb.Rev.Stat. sec. 42.369 (1972); *Moates v. Morgan*, 440 So2d 1069 (Ala. 1983); *Catlett v. Catlett*, 412 P2d 942 (Okla. 1966); *Britton v. Britton*, 671 P2d 1135 (N.M. 1983).

/26/ *Zeitlen v. Zeitlen*, 544 SW2d 103 (Tenn.Ct.App. 1976); *Kroeger v. Kroeger*, 353 NW2d 60, 120 Wis.2d 48 (App. 1984); *Griffin v. Avery*, 424 A2d 175 (N.H. 1980).

/27/ *Anderson v. Anderson*, 199 SE2d 800 (Ga. 1973).

/28/ Ore.Rev.Stat. sec. 107.095(2) (1979); Neb.Rev.Stat. sec. 42.369 (1972).

/29/ Social Security Act sec. 466(a)(4); 42 USC 666(a)(4).

/30/ 10 Md. Code Ann. 126.

/31/ D. Dodson and R. Horowitz, "Child Support Enforcement Amendments of 1984: New Tools For Enforcement," 10 FLR 3051, 3055 (1984).

/32/ Sec. 521.010 RSMo (1978).

/33/ *Masten v. Fellerhoff*, 326 F.Supp. 969 (S.D. Ohio 1981); *Tetro v. Tetro*, 544 P2d 17 (Wash. 1975); *Brotzman v. Brotzman*, 283 NW2d 600 (Wis. 1979). *Rutherford v. Rutherford*, 296 Md. 347, 464 A2d 278 (Md.Ct.App. 1983); *Young v. Whitworth*, 522 F.Supp. 759 (DC Ohio 1981).

/34/ *Sword v. Sword*, 249 NW2d 88 (Mich. 1976); *Duval v. Duval*, 322 A2d 1 (N.H. 1974); *Department of Human Services v. Rael*, 642 P2d 1099 (N.M. 1982); *Jolly v. Wright*, 265 SE2d 135 (N.C. 1980); *McNabb v. Osmundson*, 315 NW2d 9 (Iowa, 1982); Cox v. Slama, 355 NW2d 401 (Minn. 1984).

/35/ *Andrews v. Walton*, 428 So2d 663 (Fla. 1983); *Vela v. Colorado District Ct. of Arapahoe Co.*, 664 P2d 243 (Colo. 1983); *In re Calhoun*, 350 NE2d 665 (Ohio 1976).

/36/ See also *Mahaffey v. Mahaffey*, 238 Ga. 64, 230 SE2d 872 (1976); *Woodall v. Woodall*, 397 So2d 524 (La.App. 1981); *Bailey v. Bailey* 95 NW2d 533 (S.D. 1959).

/37/ *Handbook for Proceeding On Violations of Penal Code Section 270*, Office of the District Attorney Bureau of Family Support Operations, p.21 (1982 ed. Los Angeles, CA).

/38/ Social Security Act sec. 466(a)(4); 42 USC 666(a)(4).

/39/ Social Security Act sec. 466(a); 42 USC 666(a).

/40/ 24 AmJur2d, Divorce & Separation, secs. 751-753.

/41/ 24 AmJur2d, Divorce & Separation, sec. 241.

/42/ Mich. Stat. Ann. sec. 552.27.

/43/ Social Security Act sec. 466(a).

/44/ 45 CFR 303.105(e).

/45/ 45 CFR 303.71(c)(4), (e), and (f).

/46/ 45 CFR 303.71(f).

/47/ 26 USC 6303.

/48/ 26 USC 6305.

/49/ P.L. 97-248; 42 USC 665.

/50/ 33 CFR 54.05(b).

/51/ 42 USC 665(a)(2)(A).

/52/ 42 USC 665(a)(1).

EXHIBIT 6.1*

IN THE CIRCUIT COURT OF ________ COUNTY
STATE OF ________

)
____,)
Plaintiff,)
vs.)
)
____,)
Defendant.)

Case No. ________

MOTION FOR JUDGMENT

_______________ respectfully moves the Court to enter judgment against the _______________ in the sum of _______________. On _______________, the _______________ was ordered to pay into the Registry of the Court child support payments in the amount of _______________ per month on or before the ____ day of each and every month commencing _______________. From _______________ through _______________, _______________ should have made __________ payments totaling _______________. _______________ actually paid into the Registry of the Court and directly to _______________ and directly to the child support enforcement unit the sum of _______________, leaving a balance in arrears in the sum of _______________ as of and through _______________.

WHEREFORE, _______________ prays for an Order for Judgment in _______________ favor and against the _______________ in the amount of _______________; plus interest thereon at the rate of __ percent per annum from and after the date hereof; further that execution may enter forthwith, and for such other and further relief as the Court may deem proper.

By: ____________________________

STATE OF) ss.

_________________________ of lawful age, being first duly sworn upon oath, deposes and says that _________________________ is the _____________________ herein; that _________________________ has read the foregoing Motion for Judgment; and that the same is true of _____________________________ own knowledge.

____

Before me personally appeared _______________, known to me to be the person whose name is subscribed herein, and acknowledged that _______________, signed and subscribed to the foregoing Motion for Judgment as _____ free and voluntary act and deed and for the uses and purposes therein set forth.

Subscribed and sworn to before me this ____ day of __________, ___ A.D.
My commission expires ____________________________.

____
Notary Public

*Source: State of Colorado, Child Support Enforcement Division.

EXHIBIT 6.2*

IN THE CIRCUIT COURT OF ____________________ COUNTY
STATE OF _____________

)
)
____,) Case No. _________
Plaintiff,)
) AFDC __ Non-AFDC __
vs.)
) **LIEN REQUEST**
____,)
Defendant.)

I. On ______________________, 19___:

___ A. A support judgment was rendered by this court in the above captioned cause.

___ B. A support judgment was rendered by the Circuit Court of __________________ County, _________________. Attached is a transcript of that judgment and a copy of the Lien Request filed in that county filing, docketing, and recording in accordance with ______________________.

___ C. An administrative order for child support and STATE DEBT/ARREARAGE was filed by the Director of the __________________ under the above caption.

___ D. An administrative order for child support and STATE DEBT/ARREARAGE was filed in the Circuit Court of _________ County by the Director of the __________________, thereby becoming a judgment of that county. Attached is a transcript of that judgment and a copy of the Lien Request filed in that county for filing, docketing, and recording in accordance with ______________________.

II. The following information, if designated, applies to amounts due under the judgment referred to in "I." above:

___ A. On ______________, 19___, ______________ assigned to the _______________________ the rights to receive support payments under said judgment.

___ 1. That assignment is now in effect.

___ 2. That assignment terminated as to future support on _______________, 19___.

___ B. _________________________________ is a IV-D non-AFDC client.

*Source: Missouri Division of Family Services, Form SEU-650.

___ C. Pursuant to _________, a sworn affidavit, attesting to the number of unpaid installments, the dates when such unpaid installments became due, the total support or maintenance due and unpaid, and the last-known mailing address of the obligor, is attached hereto.

III. Please record the support judgment or judgments referred to above as liens, in accordance with ____________________.

____

DISTRICT ATTORNEY

____

BY ASSISTANT DISTRICT ATTORNEY
ATTORNEY FOR PLAINTIFF

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EXHIBIT 6.3*

STATE OF)
) ss.
COUNTY OF)

ARREARAGE AFFIDAVIT

Now comes ______________________________, of lawful age, being duly sworn upon ______________ oath, and states as follows:

1. That ______________ is the obligee of the support order entered in case # ________________________, county of ________________________________.

2. That ____ has failed to pay ______________ installments under said order.

3. That the dates and amounts of each unpaid installment are as follows:

Date	Amount	Date	Amount	Date	Amount

4. That the total support due and unpaid under said order is $______________.

5. That the last-known mailing address of ____________________________ is ____.

____
(Signature) (Date)

SUBSCRIBED AND SWORN TO before me this ______ day of ________________, 19____.

____
Notary Public - State of ________________
My commission expires: _________________

*Source: Missouri Division of Family Services, Form SEU-509L.

EXHIBIT 6.4*

LIEN REQUEST COVER DOCUMENT

INSTRUCTIONS TO CLERK

Upon receipt of a Lien Request and Arrearage Affidavit, you shall complete and mail the Notice to Obligor with a copy of the Arrearage Affidavit and a copy of the Lien Request attached. These documents shall be mailed to the last known address of the obligor as stated on the Arrearage Affidavit. If you have not previously been named as trustee for the collection of support, the Lien Request must be accompanied by a motion to name the circuit clerk as trustee. The obligor shall have thirty (30) days from the date of mailing to request a hearing. If a hearing request is not received within the stipulated time frame, the Arrearage Affidavit shall be conclusive of the amount of the arrearage existing at the time the Lien Request was filed. Your records of payments received as trustee shall be conclusive of the extent of the arrearage after the date of the order naming you as trustee.

NOTICE TO ____________________, OBLIGOR

You are hereby notified that a Lien Request has been filed alleging that you owe past-due child support. The purpose of this Lien Request is to place a lien against any real estate you may own. This Lien Request is acompanied by an Affidavit alleging the amount of past-due child support during periods when the circuit clerk was not named as trustee to receive child support. During periods when a trusteeship was effective, the circuit clerk's records are conclusive of payment or nonpayment.

If you disagree with the Arrearage Affidavit, you have 30 days from the date this notice was mailed to request a hearing. You must make your request in writing to the Circuit Clerk listed below and also send a copy to the Child Support Enforcement Investigator (name and address listed at the bottom of the attached Lien Request). You are not entitled to a hearing for an arrearage that accrued during a circuit clerk trusteeship, as the payment record of the circuit clerk is conclusive pursuant to ________________________.

____
Circuit Clerk of

______________________________, __________.

____
(Street Address)

____
(City) (State) (Zip)

Mailed: ____________________, 19__.

*Source: Missouri Division of Family Services, Form SEU-650A.

EXHIBIT 6-5

IN THE CIRCUIT COURT OF ______________ COUNTY
STATE OF __________

______________________________________,)
Plaintiff,)
vs.)

______________________________________,)
Defendant.)

Case No. ________

RELEASE OF LIEN

KNOW ALL MEN BY THESE PRESENTS, that I, ________________, attorney for _________________________, assignee of plaintiff in the above-captioned cause, which resulted in judgment against defendant ____________________, dated ________________, ______, a certified copy of which was recorded in the Recorder of Deeds of ________________ County, on ________________, do hereby certify that the ______________________, in its capacity as judgment creditor, hereby RELEASES ITS LIEN OR CLAIM OF LIEN RESULTING FROM SAID JUDGMENT, UPON CERTAIN REAL PROPERTY, subject of a pending sale to one ____________________________________, which Real Property is described as:

This RELEASE OF LIEN should not be construed as a satisfaction of judgment nor release of any liens that the ____________________________________ may possess as to other property of the defendant, whether real or personal.

I declare under penalty of perjury that the foregoing is true and correct. Executed on ______________________, 19____ at ________________.

____
Attorney for IV-D Agency

EXHIBIT 6.6*

IN THE CIRCUIT COURT OF ______________ COUNTY
STATE OF _______________

In Re The Marriage Of)
______________________________________)
)
and)
______________________________________)

State of _____________ ex rel.)
______________________________________,)
Assignee,) Case No. __________
and)
______________________________________,) MOTION FOR CONTEMPT
Assignor,)
Petitioners,)
)
vs.)
)
______________________________________,)
Respondent.)

Come now petitioners, by and through the District Attorney for _____________________ County, ____________, and state to the court that:

1. On the _____ day of __________, 19___, after a full hearing by the court, an Order was issued, the original of which is on file in this court, whereby respondent was ordered to pay child support in the sum of $______ per ______, commencing __(date)__.

2. Respondent was present in person when such Order was entered by the court, or a copy of such Order was timely served upon respondent.

3. On __________________, 19___, petitioner, ____(client)____, assigned to the _________________________ in behalf of the State of ________ "all vested, existing rights to receive support payments which are past due, currently due, or which will become due in the future ...;" a copy of such assignment is attached hereto as Exhibit "A" and incorporated herein.

4. Notice of delinquency has been given by registered or certified mail, and more than 10 days have elapsed subsequent to such Notice.

5. Respondent has willfully failed and refused to make payments in accordance with this court's Order and is now delinquent in the amount of $________. Petitioner ______________________'s affidavit regarding the amount of delinquency is attached hereto, as Exhibit "B" and incorporated herein.

6. The refusal of the respondent to make child support payments as ordered constitutes a direct, willful, and deliberate violation of the order of this court.

*Source: Missouri Prosecutor's Deskbook, Form 45-1.

WHEREFORE, petitioners pray that an Order to Show Cause be issued out of this court directed to respondent, requiring said respondent to appear and show cause why he should not be cited for contempt and why petitioners should not recover their costs and expenses herein, and why the court should not make such other orders and give such other relief as may be just and proper.

____
District Attorney
Address
Phone number

STATE OF ____________)
) SS
COUNTY OF ____________)

__________________________, being first duly sworn, deposes and states that she is the petitioner in the above cause, that she has read the foregoing Motion for Contempt, and knows the contents thereof, and that the statements and allegations therein are true to her best knowledge and belief.

____
(Name)

Subscribed and sworn to before me, a Notary Public, on this _____ day of __________________, 19___.

____
Notary Public

(Seal)

My Commission expires: ________________

EXHIBIT 6.7*

IN THE CIRCUIT COURT OF __________ COUNTY
STATE OF __________

In Re The Marriage Of)
_______________________________________)
)
and)
_______________________________________)

State of _______________ ex rel.)
_______________________________________,)
Assignee,)
) Case No. __________
and)
_______________________________________,) ORDER TO SHOW CAUSE
Assignor,)
Petitioners,)
)
vs.)
)
)
_______________________________________,)
Respondent.)

WHEREAS, petitioners, by and through the District Attorney of _____________________ County, __________, have filed in the above-entitled cause a motion to hold you, the said respondent, in Contempt of Court, a copy of which is attached hereto and made a part hereof, charging that you have willfully failed and refused to make child support payments in accordance with an order of this court dated _______________, 19___;

NOW, THEREFORE, you, the said respondent, are hereby COMMANDED to be and appear before this court on __________________, at ___________ a.m./p.m. and to show cause, if any, why you should not be punished according to law and justice for contempt, by your failure and refusal to pay the said support of the decree of this court.

It is further ORDERED that you must personally appear before the court and, should you fail to appear without just cause, an order for your arrest will be entered.

____
Date

____
Judge of the Circuit Court
__________________ County, ____________

*Source: Missouri Prosecutor's Deskbook, Form 45-2.

Please bring all proof you have, such as paycheck stubs, doctors' statements, tax returns, etc., to show why you have not made these payments. If you are found in contempt, you may be imprisoned and/or assessed a fine and costs.

SHERIFF'S RETURN

I hereby certify that I served the within Order to Show Cause on ____________________, 19__, in the County of __________________ and State of _____________, by: ___________________________________.

____
Date

____
Sheriff

By: ______________________________
Deputy Sheriff

EXHIBIT 6.8*

IN THE CIRCUIT COURT OF __________ COUNTY
STATE OF __________

State of __________, ex. rel.)	
____,)	
Assignee,)	
)	Case No. __________
and)	
	ORDER IN MOTION FOR CONTEMPT
____,)	
Assignor,)	
Petitioners,)	
vs.)	
)	
____,)	
Respondent.)	

On this _____ day of ____________, 19___, come petitioners, by their counsel, _________________________, District Attorney for _____________ County, and also comes respondent, _____________________, in person, with his attorney, ______________________________.

The Motion for Contempt in the above-entitled cause filed in this court on ____________________, 19___, is taken up and heard upon the pleadings and proof adduced, the court being fully advised finds that support is due as prayed in the Motion, and that from ___________________, 19___, through ______ ____________, 19___, said respondent is in arrears in child support payments in the amount of $____________________, that he had the ability to comply with the Order of this court dated _____________, 19___, and is therefore in Contempt of this Court. The Court further finds that respondent has the present ability to purge himself of this contempt by ____________________________.

WHEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED by the Court that ______________________, respondent, be committed to the ______________ County Jail until such time as respondent purges himself of this Contempt by ____
____
_________, or until the above-stated arrearages are paid in full.

It is further ORDERED that the costs of this action be taxed against respondent.

____
Judge

*Source: Missouri Prosecutor's Deskbook, Forum 45-5.

EXHIBIT 6.9*

IN THE CIRCUIT COURT OF __________ COUNTY
STATE OF __________

In Re The Marriage of)
______________________________________)
)
and)
______________________________________)

State of ______________ ex rel.)
______________________________________,)
Assignee,)
)
and)
______________________________________,)
Assignor,)
Petitioners,)
)
vs.)
______________________________________,)
Respondent.)

Case No. ______________

ORDER OF COMMITMENT

To the Sheriff of ___________________ County, ___________________:

WHEREAS, on the ______ day of _______________, 19___, a Petition for _________________ was filed in the above action. After full hearing by the court an order was issued, the original of which is on file in this court, ordering ____ to ____.

WHEREAS, on the _____ day of _______________, 19 __, a Motion for Contempt was filed in the above section. After full hearing by the Court an order was issued, the original of which is on file in this Court, ordering ______________________ to ____.

AND

WHEREAS, said Order was in full force and effect on and after ____________, 19__, and

WHEREAS, subsequent to the issuance of said order, _____________, with full and complete knowledge of the said order, has willfully failed and refused to comply with its terms, and

WHEREAS, on the ________ day of ____________________, 19___, an order was issued by this court ordering ________________________ to appear and show cause why he should not be held in contempt of court, and

*Source: Missouri Prosecutor's Deskbook, Forum 45-6.

WHEREAS, on the ____________ day of ________________, 19___, ______________________ was adjudged guilty of contempt of court because of his said refusal to comply with the said order, and was ordered committed to the County Jail of ________________ County, _________________, until such time as he has purged himself of this contempt by _________________________________ ____ ____.

NOW, THEREFORE, you are commanded to attach the said _____________ and commit him to the County Jail of ________________ County, _______________, until such time as he has purged himself of contempt by ___________________ or until he be otherwise discharged according to law.

____
Judge

CHAPTER 7

Defenses to Enforcement

INTRODUCTION

This chapter examines a number of the defenses absent parents raise most frequently in their attempts to avoid enforcement of support orders. (Chapters 7 and 9 discuss defenses raised to prevent the establishment of an order and defenses peculiar to interstate cases, respectively.) This chapter covers the following defenses: inability to pay; termination of parental rights; custody and visitation interference; release agreements; waiver by acquiescence, laches, and other equitable defenses; payment by alternative method; nonpaternity; statutes of limitation; emancipation; death of obligor; bankruptcy; property exempt from execution; challenges to the State's authority to enforce the order; and attacks on the validity of the support order due to lack of personal jurisdiction.

Most defenses to enforcement of child support orders have been held valid in at least some States. Especially as to the equitable defenses, the appellate decisions make it clear that the ruling is made in light of the circumstances of each particular case. An appellate court most likely will give great deference to the trial court's ruling, unless the law is clear. For this reason, child support enforcement attorneys should be well armed at the trial court level with case law from other jurisdictions and compelling arguments of public policy favoring enforcement. Many of the cases cited in this chapter contain good public policy discussions, some as dicta.

The child support attorney also should remember that State appellate courts are increasingly supportive of the Child Support Enforcement Program and are overturning outdated decisons in the child support enforcement area. Even if a trial court is compelled to follow a long line of musty common law, recent moves by a majority of other States can sway appellate courts. More important, the Child Support Enforcement Amendments of 1984 will markedly diminish the effectiveness of many defenses, at least at the enforcement stage. Once States comply with the 1984 Amendments, income withhholding will be the remedy of choice, both for intrastate and interstate cases. (See discussions in Chapters 6 and 9.) The 1984 Amendments require the obligor's defenses to be severely limited in the context of income withholding proceedings. That is not to say that the defenses will disappear entirely. Defense counsel are sure to find strategies to continue to make the arguments discussed in this chapter, most probably in support of motions for modification. Thus, the case law cited in this chapter should continue to be relevant.

INABILITY TO PAY

Inability to pay is a frequent defense to a collection action based on the obligor's alleged lack of means to support himself or herself adequately and still comply with the support order. As treated here, the defense does not suggest active or passive avoidance of the duty to support. In most States, an obligor's financial straits may limit the effectiveness of coercive or criminal remedies, particularly contempt of court. To the contrary, inability to pay is not generally an effective defense against remedies directed at specific property.

Inability to pay as an enforcement defense should not be synonymous with inability to pay as a basis for retroactive modification in States that allow such modifications. The court should not, sua sponte, modify (prospectively or retroactively) a support order based on finding of the obligor's inability to pay made during the course of an enforcement proceeding. Ideally, the obligor should be required to file a proper motion for such relief and give the obligee notice and an opportunity to defend the motion, whether in a separate proceeding or with the enforcement action.

Civil Contempt

An obligor may be incarcerated for civil contempt for willfully failing and refusing to comply with a court order for child support. This remedy is coercive in nature. The court must find that the obligor has the present ability to comply with the order or has a capability of performing some other task (e.g., execution of income assignment, seeking work, enrolling in a drug or alcohol rehabilitation program); however, he or she must have refused to meet the purgation requirement before jail may be imposed. If the obligor was financially unable to comply with the support order at the time the arrearage accrued, but has assets available to satisfy the arrearages at the time of the contempt hearing, the court may find him or her in contempt for a present refusal to apply the assets to the arrearages.

If the obligor was able to pay the support when it fell due, but has no funds from which the obligation can be paid at the time of the hearing on contempt, the court may make a contempt finding. However, the court may not impose incarceration as a means of coercing the obligor into compliance, since he or she would not have the present ability to purge himself or herself.

Generally, in civil contempt actions, the court has ordered the obligor to show cause why he or she should not be held in contempt for noncompliance, placing the burden on the obligor to prove present inability to pay and that this inability is not due to his or her fault or negligence. [Faircloth v. Faircloth, 339 So2d 650 (Fla. 1976).] Some courts have gone so far as to impose on the obligor additional burdens when an inability to pay defense is raised. For example, in Ex Parte Hennig, 559 SW2d 401 (Tex.Civ.App. 1977), the court held that the obligor could be required to show that he had no real or personal property that could be sold; that attempts at borrowing had been made and were unsuccessful (with particulars); and that the obligor knew of no other source, including relatives, from whom he could borrow the funds to satisfy the support obligation. Similarly, in Dawson v. Dawson, 453 So2d 1054 (Ala.Civ.App. 1984), the court stated that merely being unemployed and having no cash is inadequate proof of inability to pay. In that case, the obligor recently had been awarded considerable assets by the divorce judgment that were unaccounted for at the contempt hearing. The court concluded that they still should be available for satisfying the child support delinquency.

If the obligor placed himself or herself in a position of being financially unable to comply with the support order and the court finds the acts of the obligor to be in contumacious disregard of the court's order, the obligor may be held in contempt. Generally, however, the obligor cannot be incarcerated for civil contempt, again, because he or she would not have the "keys to the jailhouse." An exception could occur when the court has imposed a purgation requirement other than payment of money and the obligor has refused to perform.

Criminal Contempt

Some courts have stated that criminal contempt proceedings may become appropriate when a person commits chronic violations of a court order, single violations of which constitute civil contempt. In those cases, the repeated violations constituted blatent contumacy. National Popsicle Corp. v. Kroll, 104 F2d 259, 260 (CA2 1939). Criminal contempt is defined as conduct that tends to impair the authority of the court. A judgment of criminal contempt is punitive, rather than coercive in nature. For this reason, the obligee need not show that the obligor has the present ability to meet the obligation, and a criminal sentence, rather than a purgation requirement, is imposed.

In Murray v. Murray, 587 P2d 1220 (Hawaii 1978), the Supreme Court of Hawaii determined that an obligor could be sentenced for criminal contempt for willfully violating the terms of a support order, even though, at the time of the hearing, he or she did not have the present ability to comply with the order or to pay the arrearages. The court pointed out, however, that when criminal sanctions are imposed, all statutory, procedural, and due process requirements must be followed strictly.

Remedies Directed Against Specific Property

An absent parent's prior or present inability to pay child support generally is not a successful defense to actions directed at specific assets of the absent parent, such as garnishment of wages or levy and execution on real or personal property. In the majority of States, past-due support installments become vested as judgments in favor of the obligee immediately on default, and the courts have no power to give retrospective application to a modification. In these States, the obligor must seek prospective modification of the support order at the time his or her change in circumstances makes it impossible to meet the support obligation.

In jurisdictions requiring the arrearages to be reduced to judgment before collection action may be directed against property, many courts allow the absent parent to argue for equitable relief justifying retroactive modification based on his prior inability to pay the ordered amount of support. [Welser v. Welser, 149 A2d 814 (N.J.App.Div. 1959).] In these instances, the defense arises in the obligee's action to obtain judgment on the arrearages, which may be combined with a request for attachment of the obligor's property. Once the judgment is obtained, however, the obligor is estopped from collaterally attacking it in the future in a subsequent action against property.

The Supreme Court of Iowa, in In re Marriage of Vetternack, 334 NW2d 761 (Iowa 1983), adopted a novel approach to a father's argument that his child support payments should be reduced because of his inability to pay while he was incarcerated. In upholding the trial court's application of the father's equity in the marital home to the child support obligation, the court noted that inability to pay has become less a consideration while a long-range capacity to earn money has become more of a consideration. Also, in this case the court implied that the father's incarceration was a voluntary diminishing of his earning capacity.

TERMINATION OF PARENTAL RIGHTS

A parent's legal relations with his or her child may be terminated by reason of abuse, neglect, or abandonment of the child or after consent to the child's adoption. A final decree of adoption terminates all legal relations between the adopted child and his or her natural parent or parents. Upon adoption, all unvested legal rights between the adopted child and his or her biological parents are absolutely terminated; and the natural parents are relieved of all future duties and obligations, including support, with respect to the child. However, if an obligor's child support arrearages have been reduced to money judgment, or have attained such status by operation of law, the right to such payments becomes vested, and the debt is not affected by the adoption. [C. v. R., 404 A2d 366 (N.J. 1979).] "The accrued arrearages represent monies due pursuant to a valid judgment ordering payments for the support and benefit of the minor child. . . . Such arrearages are still due and owing and have not been eradicated by the adoption decree." [Sample v. Poteralski, 313 SE2d 145 (Ga.App. 1984).]

Adoptions involving minor children whose natural parents are living require parental consent, unless the parent-child relationship has already been terminated on other grounds, such as abuse, neglect, or abandonment, or that termination would be in the children's best interests. [In Interest of Goettsche, 311 NW2d 104 (Iowa 1981).] Frequently, in exchange for a consent to the adoption, the custodial parent agrees to waive the right to collect accrued child support arrearages. [Rodgers v. Rodgers, 505 SW2d 138 (Mo.App. 1974).] In most States, the custodial parent has the legal authority to bargain away the arrearages as consideration for the consent, which is viewed as a simple contractual agreement. However, since a custodial parent generally lacks authority to bargain away current or future support, the agreement may not purport to waive support due between the signing of the agreement and the final adoption order. [Rodgers, supra, at p. 145.]

When the adoption does not take place, the natural parent remains responsible for support of the child. In Rodgers, supra, the consent of the father was obtained but the final adoption decree was never entered. The natural father discontinued child support payments but had not been notified of the failure to finalize the adoption. The mother, on seeking collection of arrears, was held to have acquiesced in the father's failure to make child support payments as they became due and thereby waived the right to enforce these payments. The appellate court, however, reinstated the father's duty to pay support in the future.

When parental rights are terminated for neglect, nonsupport, or other reasons not directly connected with an adoption proceeding, and the child becomes a ward of the State, the parental obligation of support is not always terminated automatically. "Classification of a minor as a ward of the State is not a sufficient basis for automatically reducing child support. . . . While a child committed to the care and custody of the State may no longer in fact depend on parental support, dependence [is not] the measure of parental obligation. . . ." [Patrzykont v. Patrzykont, 644 P2d 1009 (Kan.App. 1982).] However, in Dept. of Human Resources v. Vine, 662 P2d 295 (Nev. 1983), the mother obtained sole parental rights, and the State IV-D agency was unable to reimpose a support obligation on the father after the mother applied for public assistance.

CUSTODY AND VISITATION INTERFERENCE

The general rule is that visitation and child support are separate, not interdependent issues. Thus, a refusal of visitation by the custodial parent does not relieve the absent parent of his or her child support obligation. [Thomas v. Thomas, 335 SW2d 827 (Tenn.

1960); Williams v. Williams, 143 SE2d 443 (Ga.App. 1965).] The primary consideration is the best interest of the child in whom both visitation and support rights reside.

For an analysis of the case law on a court's authority to cancel or modify arrears, to refuse to enforce arrears, to suspend future support payments, or to set up a trust fund on the child(ren)'s behalf when the custodial parent denies visitation privileges in violation of a court order or separation agreement, see 95 ALR2d 118. Another annotation at 8 ALR4th 1231 discusses cases in which the custodial parent violates a clear judicial prohibition against removing the child(ren) from specified geographical boundaries, and the resulting authority of the court to terminate, suspend, or reduce child support payments.

Substantial portions of the Uniform Marriage and Divorce Act (UMDA) have been adopted in eight States and selected portions in many more. A provision of the Act states, in part, that if a party fails to comply with a provision of a decree or temporary order, the obligation of the other party to make payments for support or to permit visitation is not suspended, but he or she may move the court to grant an appropriate order. [UMDA, 9A U.L.A., sec. 315.] There are few interpretive decisions, but two Illinois courts have held that the appropriate remedy for a father who has been denied visitation is to move the court for contempt against the mother and possibly a change of custody in the appropriate circumstances. [Huckaby v. Huckaby, 393 NE2d 1256 (Ill.App. 1979); People ex rel. Winger v. Young, 397 NE2d 253 (Ill.App. 1979).]

RELEASE AGREEMENTS

Generally, an agreement between the parents of a child made outside the courtroom that purports to absolve the absent parent of the support obligation is invalid. [100 ALR3d 1129.] Regardless of agreements or disagreements between parents, children are entitled to continuing support in accordance with their needs and the parents' ability to provide for them. The amount of support required and the ability of each parent to provide such support are questions which rest primarily with the trial court. [Flynn v. Flynn, 604 SW2d 785 (Mo.App. 1980).] Nevertheless, such agreements ocassionally form the basis of a defense. They can be express attempts at accord and satisfaction, or implied as a result of a reconciliation between the parents.

Accord and Satisfaction

"An accord is a contract to discharge an existing cause of action, tort, or contract. Satisfaction is the performance of such contract."[1] In the context of child support arrearages, accord and satisfaction can be defined as an agreement between the absent parent and the custodial parent relieving the absent parent of past due child support payments, either in exchange for some other valid consideration or if supported by the requisite donative intent.

The most significant distinction in determining the validity of agreements is between past-due support and future payments. Arrearages have been held to represent a debt due the obligee for prior care given the child(ren) and, therefore, may be negotiable. In Andersen v. Andersen, 407 P2d 304 (Idaho 1965), the court examined an agreement releasing the father from past-due support and reducing future support in exchange for a $600 lump-sum payment and a set of carpenter's tools. The agreement as to the arrearages was upheld, but the court held that the mother could not release the father permanently from his duty to provide future child support; it remained within the exclusive province of the court to modify its support orders.

Extending the concept further to include arrears, numerous cases support the proposition that any agreement between former spouses purporting to release the absent parent from the support obligation as ordered by the court is void, as against public policy. The general principle is that parents by agreement cannot nullify a court's order so as to deprive a minor child of the support granted in the decree. [100 ALR3d 1129, sec. 4(c), PP. 1149-1153.]

In some instances, courts have invalidated agreements between parents on the ground of insufficient consideration. For example, in Herb v. Herb, 103 NW2d 361 (Iowa 1960), the court held that there was no consideration for an agreement to reduce the decreed child support payments from $30 per week to $70 per month. According to the ruling, the custodial parent gained nothing she was not already entitled to receive, and the absent parent did not obligate himself to do anything he was not already required to do. Similarly, in McCabe v. McCabe, 167 NE2d 364 (OhioApp. 1959), the court held as unenforceable the obligor's agreement to make up back support payments and give consent for the wife's present husband to adopt, in exchange for a release of his future obligation because he was bound by law to pay the support arrearages and the adoption did not go through. In State ex rel. Hansen v. McKay, 571 P2d 166 (Or.App. 1977), the court found that a gratuitous satisfaction of judgment by a mother who had assigned her support rights to the Oregon IV-D agency had no effect on the agency's right to enforce the judgment.

Remarriage of Absent and Custodial Parents

According to the Illinois Court of Appeals (4th District) in Ringstrom v. Ringstrom, 428 NE2d 743 (1981), the vast weight of authority holds that the remarriage of the parties to each other annuls the prior divorce decree and restores the parties to their respective rights as if they had never been divorced. Therefore, the mother may not later seek to collect arrearages that accured under the order for support contained in the first divorce decree. It is questionable whether this rule would be applied to support arrears that had been assigned to a State IV-D agency prior to remarriage. As noted in Greene v. Iowa District Court, 312 NW2d 915 (Iowa 1981), a valid assignment of a support judgment gives the assignee rights that cannot be affected by the assignor without the assignee's consent. In Greene, the court followed decisions from Georgia and Nebraska in holding that the remarriage of the parents does not automatically vacate a judgment for accrued support installments nor does it deprive the divorce court of subject matter jurisdiction to enforce the obligation as to those unpaid installments.

Temporary Reconciliation

Courts generally have held that the temporary reconciliation of the mother and father while the divorce is pending or subsequent to the divorce does not nullify or abate the child support order. In Scully v. Scully, 331 NW2d 801 (Neb. 1983), the court stated that there was no authority to reduce past-due installments for child support and that the father remained liable for $11,700 in unpaid child support for a period in which the mother and children resided in his home. The court admitted that in some circumstances the principle of equitable estoppel would preclude collection, based on grounds of public policy and good faith. Circumstances would require good faith reliance on statements or conduct of the party to be estopped, and a change of position to his detriment by the party claiming estoppel.

WAIVER BY ACQUIESCENCE, LACHES, AND OTHER EQUITABLE DEFENSES

Waiver by acquiescence and laches are similar defenses. Black's Law Dictionary defines laches as a failure to assert a claim within a proper time, while acquiescence implies knowing assent on which another relies.

In regard to child support enforcement, 5 ALR4th 1015 defines laches as a delay in seeking recovery of arrearages of court-awarded child support. It is ordinarily a defense to such recovery only when it is shown that the custodial parent's delay in seeking recovery prejudiced the absent parent. Papcun v. Papcun, 436 A2d 282 (Conn. 1980), held that prejudice was not established because the absent parent had not changed his circumstances in reliance on the custodial parent's 9-year delay in failing to collect payments. When prejudice is established, as in Anthony v. Anthony, 204 NW2d 829 (Iowa 1973), where the wife delayed 17 years in pursuing her right to collect child support, the deciding factor was the absent parent's reliance on her delay, which led him to believe she intended to waive or abandon recovery. Laches in this case was held to be a valid defense.

Laches may be a partial defense, as demonstrated by Eckard v. Gardner, 257 A2d 174 (Md.App. 1969). Laches was held to constitute a partial bar to an attempt by a divorced wife to obtain a judgment for arrearages in alimony and child support that were approximately 13 years past due. The divorced wife had waited too long to recover arrearage payments meant to cover current support obligations. The court awarded arrearages for only 3 years prior to the filing of the petition.

Another view is that the doctrine of laches has no application to child support obligations. [Fitzgerald v. Fitzgerald, 618 P2d 867 (Mont. 1980).] Under a divorce decree, the liability of a parent for child support payments should be unaffected by the laches of the other parent in seeking enforcement of the child's rights. Proceedings to enforce support judgments are "equitable in nature, and a mother may not be found to have waived her child's right to receive support from its father by failing to promptly enforce it." [Armour v. Allen, 377 So2d 798 (Fla.App. 1979).]

The defense of waiver by acquiescence implies the obligee's knowing waiver to nonpayment or partial payment of child support. Material prejudice is not always a requirement of estoppel by acquiescence. [Davidson v. Van Lengen, 266 NW2d 436, 5 ALR4th 1001 (Iowa 1978).] However, there must be substantial evidence that the custodial parent had intended to waive back child support. Sheffield v. Strickland, 599 SW2d 422 (Ark.App. 1980), also notes that laches, estoppel, and statutes of limitation are affirmative defenses to a petition to reduce arrears to judgment, and must be pleaded affirmatively. If the evidence does not support the obligor's contention that there was an agreement to reduce or waive child support payments, then the obligee will not be held to have acquiesced. [Lewis v. Lewis, 256 NE2d 660 (Ill.App. 1970).]

In In re Marriage of Homan, 466 NE2d 1289 (1984), the 1st District Illinois Court of Appeals stated that the defense of equitable estoppel must be proved by clear and unequivocal evidence. Equitable estoppel arises when the voluntary conduct of the obligee results in good faith detrimental reliance by the obligor and an unwarranted benefit to the obligee. The court in Homan noted that cases which have found equitable estoppel have involved egregious circumstances.

In State ex rel. Division of Family Services v. Willig, 613 SW2d 705 (Mo. App. 1981), the mother testified she had not entered into written or verbal agreement with the father that he not pay child support; she admitted requesting public assistance because she did not expect to receive any child support from the father. The court found insufficient evidence to support the finding that the former wife had acquiesced in her former husband's nonpayment of child support for the 5-year period preceeding her assignment of support rights to the State. The court's determining factor was that taxpayers (through AFDC) were providing the support the husband owed and that his testimony that he had been contacted several times by the welfare department belied any contention of waiver by acquiescence.

On the other hand, the same Missouri court later found, in State ex rel. Division of Family Services v. Ruble, --SW2d--, Mo.App. E.D. 48498 (1-22-85), that, by virtue of two written agreements with the father to modify the support order, the mother had acquiesced to reduced payments. The agreements had been filed with the court, but the court heard no motion to modify support and was not asked to approve the agreements. Nevertheless, when the mother assigned her support rights to the State as a condition of eligibility for AFDC, the State was deemed to have received an assignment of the mother's legal right to receive support as specified by the original decree and not pursuant to the agreements. Further, the State was not estopped by a misrepresentation of its agents, who, over a period of more than 6 years, had instructed the father to pay child support in accordance with the filed agreements, rather than with the original decree. The State was allowed to recover the full amount due under the court order from the date of the mother's assignment of support rights.

PAYMENT BY ALTERNATIVE METHOD

Generally, as a matter of law, an obligor should not be allowed credit for expenditures made while the child is in his or her custody or for other voluntary payments made on behalf of the child that do not conform specifically to the terms of the decree. Credit for voluntary payments permits the absent parent to vary the terms of the decree and usurps the custodial parent's right to determine the manner in which support money will be spent. [Hirschfield v. Hirschfield, 347 NW2d 627 (Wisc.App. 1984); Horne v. Horne, 239 NE2d 348 (NY App. 1968); Glover v. Glover, 598 SW2d 736 (Ark. 1980).]

In determining whether credit against arrearages should be granted for nonconforming payments, the rule may hinge on whether or not the arrearages become automatic judgments as they accrue. Where support arrearages vest automatically as judgments, it is generally held that no credit may be given for nonconforming payments; to do so would be to grant a retroactive modification. [Fearon v. Fearon, 154 SE2d 165 (Va. 1967).] If, as in Cope and Cope, 619 P2d 883 (Ore. 1980), it was decided that statute bars retroactive modification of accrued installments because they have ripened into judgments, they become unmodifiable and no credit will be given. In this case, a father's Social Security benefits paid directly to the mother for the benefit of the child could not be credited retroactively against the father's child support obligation. [See also Fowler v. Fowler, 244 A2d 375 (Conn. 1968), and Chase v. Chase, 444 P2d 145 (Wash. 1968), for decisions on the court's refusal to grant credit toward child support arrears for Social Security disability payments made to the child(ren).] However, New Hampshire and Mississippi courts have followed Alabama, Arkansas, Georgia, Kansas, Massachusetts, Nebraska, New Mexico, and Tennessee in allowing a husband credit toward his overdue support obligation for Social Security payments made to the ex-wife for the benefit of the children. [Griffin v. Avery, 424 A2d 175 (N.H. 1980); Mooneyham v. Mooneyham, 420 So2d 1072 (Miss. 1982); 77 ALR3d 1315.]

Perhaps due to the harshness of the general rule, some courts have been willing to consider equitable principles where compulsory circumstances led to the substituted form of payment. Where the custodial parent expressly or by implication consents to accept an alternate form of payment as partial or complete satisfaction under the decree, some courts will give credit if the payment is in substantial compliance with the spirit and intent of the support decree. [Williams v. Williams, 405 So2d 1277 (La.App. 1981); Whitman v. Whitman, 405 NE2d 608 (Ind.App. 1980).] Credit also has been allowed where the father took custody of the children because of illness or incompetency of the mother. [Silas v. Silas, 300 So2d 522, (La.App. 1974); Lieffring v. Lieffring, 622 SW2d 519 (Mo.App. 1981); Headley v. Headley, 172 So2d 29 (Ala. 1964); White v. White, 368 A2d 1061 (Md.App. 1977).]

The credit for cash payments of gifts given directly to the child, educational expenses, or food, clothing, medical expenses, or other necessities depends to a large degree on the circumstances of each individual case. [Hamrick v. Seward, 189 SE2d 882 (Ga.App. 1972); Re Marriage of Bjorklund, 410 NE2d 890 (Ill.App. 1980); Gould v. Awapara, 365 SW2d 671 (Tex. Civ.App. 1963).]

Credit for support given by the noncustodial parent during periods of extended visitation or temporary custody usually is not permitted unless it is so provided in the decree. [Escott v. Escott, 325 NE2d 395, (Ill.App. 1975); Atkins v. Zachary, 254 SE2d 837 (Ga. 1979).] In Tuch v. Tuch, 316 NW2d 304, (Neb. 1982), the stipulation that support would abate during the 6-week visitation period was incorporated into the decree, and the absent parent was not held responsible during that period.

There is some precedent for allowing credit for support given during these periods. [47 ALR3d 1031.] James v. James, 271 SE2d 151 (Ga. 1980), noted that the noncustodial parent is not the only one obligated to support the child and ordered the custodial father to pay $15 per day for each day the couple's children visited with the mother. The courts also have upheld agreements to reduce support payments during the summer when children spend substantial amounts of time with the noncustodial parent. [Kahn v. Kahn, 532 P2d 541 (Ariz.App. 1975).]

NONPATERNITY

An absent father often will claim that, after his marriage to the mother was dissolved, he discovered that he was not the natural father of a child conceived or born during or before the marriage. Courts differ on the effect of a paternity finding or an implication of nonparentage in a divorce decree. The doctrine of res judicata would prohibit later litigation of a matter on which final judgment was reached, as long as one of the parties is not guilty of fraud or collusion. The father normally would be collaterally estopped from relitigating material facts and questions that were directly in issue in an original divorce or support proceeding. In some cases, the doctrine of res judicata extends to incidental questions arising in the previous action, so that a final judgment on matters essentially connected with the subject matter in earlier litigation may be conclusive. Under this broad concept of res judicata, most courts have found that a father and mother are bound by a finding or implication of paternity in a divorce or support proceeding. However, a child or a stranger who was not a party to the earlier proceeding is not bound by the court's determination.

Courts that have considered the effect on a father of an order entered in divorce or support proceedings are divided as to whether the paternity issue must have been raised and litigated in the original action. Decisions from almost every State are reported in the annotation at 78 ALR3d 846.

In a similar vein is the decision in In re Johnson, 152 Cal.Rptr. 121, 88 Cal.App.3d 848 (1979). Relying on Clevenger v. Clevenger, 189 Cal.App.2d 258 (1961), the court held that the husband was estopped from asserting illegitimacy in a support proceeding, even though the parties had stipulated that he was not the father of a child born 10 days prior to the parties' marriage. The court based its reasoning on facts indicating that the husband represented himself to the child as his father, that the husband intended for the child to accept and act on this representation, and that the child relied on the representation in ignorance of the true facts.

STATUTES OF LIMITATION

Statutes of limitation prevent the assertion of claims that have become stale. State statutes vary from 5 to 20 years, in which judgment creditors must act to enforce judgments before they become dormant. Normally, a judgment may be revived by a writ of scire facias. [See discussion in Chapter 6.]

A normal money judgment is based on a fixed amount and does not accrue any new or additional rights from the date of rendition. However, a child's right to support is ongoing until the child reaches majority. At the time a child support order is issued, it is not a judgment of a sum then due, like most awards, but rather a variable sum that increases as each installment is unpaid. [State ex rel. Stanhope v. Pratt, 533 SW2d 563 (Mo. 1976).] Given the installment nature of a support order, a majority of jurisdictions have ruled that the statute of limitation does not begin to run until each installment becomes due, rather than at the time the order is issued. [70 ALR2d 1250, 1258; Treaster v. Laird, 519 P2d 1231 (Colo. 1974); Bruce v. Froeb, 488 P2d 662 (Ariz. 1971); Koon v. Koon, 313 P2d 369 (Wash. 1957); Britton v. Britton, 671 P2d 1135 (N.M. 1983).]

Several courts have disallowed statues of limitation entirely, because a judgment for child support is a continuing judgment and always subject to modification by the court. [Miller v. Miller, 46 NW2d 618 (Neb. 1950).] In Knipfer v. Buhler, 35 NW2d 425 (Minn. 1948), the Minnesota court held that the statutory period does not begin to run until the children reach majority and all payments are due.

In States where each unpaid child support installment is not automatically a part of a judgment, an independent action for judgment may be brought within the appropriate statutory period after the child attains majority. In Kroeger v. Kroeger, 353 NW2d 60 (Wisc.App. 1984), the court held that the obligee had 20 years after the daughter reached the age of majority to bring an independent action for judgment. However, in Griffin v. Avery, 424 A2d 175 (N.H. 1980), the court applied the 6-year limitation applicable to "personal actions," rather than the 20-year limit on actions on judgments, since the unpaid installments were not "judgments."

Most statutes of limitation contain tolling provisions, such as the defendant's absence from the State, the minority of the plaintiff, a written acknowledgment or promise by the defendant to pay the debt, and sometimes a payment on the debt or acknowledgment on the court record of partial satisfaction of the debt. Child support attorneys should be well acquainted with the applicable statute of limitation in their State, with means of revival, and with applicable tolling circumstances.

EMANCIPATION

The obligation of parents to support their children ordinarily ceases on the children's reaching the age of majority or on the children's emancipation. [Codorniz v. Cordorniz, 215 P2d 32 (Cal. 1950); Niesen v. Niesen, 157 NW2d 660 (Wisc. 1968); 32 ALR3d 1057.] The emancipation of a minor child frees that child from parental control; at the same time, the child surrenders his or her right to maintenance and support from his or her parents. [Biermann v. Biermann, 584 SW2d 106 (Mo.App. 1979).] Thus, the courts are not required to establish or enforce support orders for any minor child who has become self-supporting, emancipated, or married or who has ceased to attend school after the applicable age of majority. [In re Miller, 660 P2d 205 (Ore.App. 1983).] A parent's liability to support terminates when the child is in no way dependent on him or her for support. [Wood v. Wood, 61 So2d 436 (Ala. 1952); In re Marriage of Fetters, 585 P2d 104 (Col.App. 1978); Isquith v. Isquith, 250 NYS2d 481, affd. 203 NE2d 925 (NY Ct.App. 1964).] For attorneys in the Child Support Enforcement Program, the problem most often arises in determining whether an absent parent is entitled to relief from further payments under an existing support order.

The defense that the child has become emancipated does not automatically relieve the parent of a support obligation. [Torma v. Torma, 645 P2d 395 (Mont. 1982).] In making such a determination, the courts have considered the circumstances of the particular case. Generally, they have ruled that the emancipation of a minor does not relieve the parent from the support order when the minor is not capable of supporting himself or herself. [Allison v. Binkley, 259 SW2d 511 (Ark. 1953).] In Kamp v. Kamp, 640 P2d 48 (Wyo. 1982), the absent parent was held liable for support of his disabled child despite the child's reaching the age of majority. The court construed the support statute to mean all "children," not just "minor children."

The fact that children are working to aid in their support when the absent parent fails to make payments as required by decree does not necessarily relieve the parent of the obligation to comply with the order for support. [Waldron v. Waldron, 301 NE2d 167 (Ill.App. 1973); Taylor v. Taylor, 412 So2d 1231 (Ala.App. 1982).] The annotation at 32 ALR3d 1055 discusses acts initiated by a minor that may have the effect of terminating a support obligation (e.g., employment, name change, refusal to visit parent).

With regard to the parent's obligation to cover the child(ren) between the ages of 18 and 21, the opinion is mixed, with many jurisdictions ruling that emancipation has no relevancy to the parent's obligation to finance the child's schooling between those ages. [Miller v. Miller, supra.] Support orders that predate the law declaring the age of majority to be 18 continue to be obligatory to age 21. [Carrick v. Carrick, 605 P2d 1215 (Ore.App. 1980).]

A child may become unemancipated during his or her minority. In Fetters, supra, the Colorado Court of Appeals found that when the daughter's marriage was annulled, the father's support obligation under the divorce decree was reinstated. The daughter was 16 and living with and dependent on her mother for support.

The question frequently arises whether an obligor may make a pro rata reduction of a court-ordered obligation on the emancipation of one child, when the order does not specify a certain amount to be paid "per child." In a case of first impression, the Supreme Court of Montana held in Torma v. Torma, 645 P2d 395 (1982), that a decree ordering the father to pay support of $125 per month for two children required continuation of the entire monthly support payment until the younger child attained majority. The court approved the rationale of courts in Colorado, Maryland, Oregon, and Connecticut and noted this position to be the rule in the vast majority of States. The court quoted from Becker v. Becker, 387 A2d 317, 320 (Md.App. 1978):

> The reason for considering a single amount to be paid periodically for the support of more than one child as not subject to an automatic pro rata reduction is two-fold. First, a child support order is not based solely on the needs of the minor children but takes into account what the parent can afford to pay. (Citations omitted.) Consequently, a child support order may not accurately reflect what the children actually require but only what the parent can reasonably be expected to pay. To allow an automatic reduction of an undivided order would be to ignore the realities of such a situation. Second, to regard an undivided child support order as equally divisible among the children is to ignore the fact that the requirements of the individual children may vary widely, depending on the circumstances. Cooper v. Matheny, 349 P2d 812, 813 (Ore. 1960). Delevett v. Delevett, 156 Conn. 1, 238 A2d 402, 404 (Conn. 1968).

On the other hand, in Patrzykont v. Patrzykont, 644 P2d 1009 (Kan.App. 1982), the court held that lump-sum orders may be reduced proportionately without modification upon death, majority, or change of custody to another parent. Interestingly, the Kansas court also pointed out that emancipation, including marriage, does not necessarily terminate the obligation of support, as dependency is not a measure of parental responsibility in Kansas.

DEATH OF OBLIGOR

At common law, the father's obligation to support his child terminated simultaneously with his death. [18 ALR2d 1126.] When there is an order to make payments for support of a child, the order terminates automatically with respect to payments that would become due after such death, unless the court has ordered that those payments shall not be affected by the parent's death. [Gordon v. Valley National Bank, 492 P2d 444 (Ariz.App. 1972).] In appropriate circumstances, a court may enter a child support order that survives the death of the father. If a judicial decree for child support is to be held to impose upon a parent a greater duty of support than that required by common law, the decree must state specifically that such obligation is to survive the death of the obligor. [Scudder v. Scudder, 348 P2d 225 (Wash. 1960).] The court, in Spencer v. Spencer, 87 NW2d 212 (Neb. 1957), based its ruling that the support obligation survived the obligor's death on the fact that the decree specifically provides that child support payments "will remain in force until the children shall become of age or self-supporting or until the further order of the court" and, thus, survive against his estate.

Although liability for support generally terminates upon the death of the obligor, parents may agree to extend that liability beyond death. If the terms of the agreement are incorporated into an interlocutory decree for divorce, there is a proper basis for a claim against the estate of the parent. [Pelser v. Pelser, 2 Cal.Rptr. 259, 177 P2d 228 (Cal.App. 1960).]

States that, by statute or agreement between parents, allow support orders to continue to be enforceable against the absent parent's estate after death are likewise enforceable for arrearages that accrued before death. [In re Cirillo's Estate, 114 NYS2d 799 (N.Y. 1952); In re Weaver's Estate, 122 NE2d 599 (Ill.App. 1954).]

In those States having adopted UMDA in its entirety, the statute provides that death of a spouse terminates a maintenance obligation but not a support obligation. [UMDA, 9A U.L.A. sec. 316(b),(c); 201 FLR 0005-0006.] In some States, the statute does not contain the provision excluding termination of support; therefore, unless "otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or death of either party." [Bushell v. Schepp, 613 SW2d 689 (Mo.App. 1981).]

BANKRUPTCY

Many absent parents seek relief from their financial obligations in the U.S. Bankruptcy Courts. Typically, such actions are filed under Chapter 7 of the Bankruptcy Code (straight bankruptcy) or Chapter 13 (wage earner plans). In the former, the relief sought is discharge from all dischargeable debts. In the latter, the debtor is seeking the protection and guidance of a bankruptcy trustee in devising and carrying out a plan to pay back all debts gradually. Either type of proceeding can have a significant effect, both positive and negative, on the collection of child support.

Debtor's Responsibilities

In addition to providing notice to all affected creditors, the debtor is required to file a schedule of his or her assets, liabilities, and exempt property. This information can be valuable to the child support enforcement agency and should be obtained from the bankruptcy court. A provision of the Bankruptcy Code allows the debtor to select a portion of his or her property as exempt from the claims of creditors. [11 USC 522(d).] The Code further provides that State law may determine these exemptions and supersede the Code provision. Many States have taken advantage of this authority, and State exemption laws often provide the obligor less protection from child support claims than from the claims of other creditors. [See, for example, sec. 452.120 RSMo (Supp.).] Thus, there may exist a pool of identified assets that may be seized to collect support arrearages.

Automatic Stay

By virtue of 11 USC 362(a), creditors generally are prohibited from taking any actions to establish or collect debts while the debtor's bankruptcy proceeding is pending. This "stay" arises automatically upon the filing of the bankruptcy petition. To the extent that it prevents the collection of child support obligations, the stay can create time-consuming litigation. In Chapter 7 proceedings, the length of time between the debtor's filing the petition in bankruptcy and the granting of the discharge is short (3 to 4 months), after which, collection action for the nondischargeable child support debt may proceed. Therefore, it is usually best to honor the stay.

Unfortunately, because of difficulties faced by State IV-D agencies in receiving and reacting properly to notices of filing, the agency occasionally will take action against an absent parent in ignorance of a pending bankruptcy proceeding. This also can be a problem with actions which take a number of months to complete, such as outstanding arrest warrants and tax refund interceptions. An exemption to the automatic stay does not make a support collection action immune from injunction. As the House Judiciary Report under 11 USCA 362 declares, the bankruptcy courts have ample powers to stay actions not covered by the automatic stay. When an action is excepted from the automatic stay, the trustee must move the court into action, rather than requiring the creditor to move for relief from the stay. In this way, the court determines on a case-by-case basis whether or not to stay a particular action. As a result, the IV-D attorney occasionally finds himself or herself in an adversary proceeding in Bankruptcy Court. In such a situation, it would help to have an argument that the stay should not apply to prohibit the collection of assigned child support. The rest of this subsection is devoted to constructing this argument.

The most helpful language exists in the automatic stay section itself. 11 USC 362(b) provides that the filing of a petition under Chapter 7 does not operate as a stay for collection of alimony, maintenance, or support from property that is not property of the estate. Property of the estate includes all of the debtor's assests but excludes exempt property and the wages the debtor earns while the bankruptcy proceeding is pending. (This is not true in Chapter 13 cases.) As a result, it could be argued that a wage garnishment or income withholding order for child support issued while a Chapter 7 bankruptcy is pending should not be stayed.

Another effective argument hinges on public policy. Section 456(b) of the Social Security Act [42 USC 656(b)] states that child support obligations which have been assigned to States pursuant to Title IV-D are not dischargeable in bankruptcy. (See below for a discussion of the dischargeability issue.) This language suggests a Congressional declaration that enforcing a parent's child support obligation is more important to society than providing that parent with a totally fresh start financially. Bankruptcy courts rightfully guard their authority to enforce the stay. The stay is necessary to allow the bankruptcy court to sort out the financial condition of the debtor, to distribute the available assets equitably among the creditors according to law, and to protect the debtor from claims against his exempt property. These are laudable provisions, designed to protect both the debtor and his family. The public policy statement, which also appears in the Code at 11 USC 523(a)(5)(A), indicates that the aims of the IV-D Program may be paramount.

Dischargeability

At 42 USC 656(b), the Social Services Amendments of 1974 (P.L. 93-647) prohibited the discharge in bankruptcy of child support arrearages which had been assigned to a State as a condition of AFDC eligibility. That provision was repealed by the 1978 Bankruptcy Code (P.L. 95-598, effective October 1, 1979), which contained a broader provision providing that child support obligations were not dischargeable where owed to a "spouse, former spouse, or child. . . . In connection with a separation agreement, divorce decree, or property agreement, but not the extent that--(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ." [11 USC 523(a)(5)(A).]

The 1978 amendment caused numerous problems for the IV-D Program. The first was the exception, which allowed assigned child support obligations to be discharged. The second was the language contained in the rule of nondischargeability itself, which limits application of the rule to support obligations in connection with a separation agreement, divorce decree, or property settlement. Since many orders established by the Child Support Enforcement Program do not meet these criteria (e.g., orders entered in paternity proceedings brought by the Program), it has been argued that they are dischargeable. This argument would seem to apply with equal force to orders entered in URESA proceedings and orders entered in State court proceedings which are not merged into the divorce proceedings.

Fortunately, Congress corrected the situation in the Omnibus Budget Reconciliation Act of 1981 by reenacting 42 USC 656(b) and amending 11 USC 523(a)(5)(A). The new version of the latter section creates an "exception to the exception to the exception" by providing that assigned support obligations that have been assigned eligibility for public assistance are again nondischargeable. The 1981 Amendments did not change that language in 11 USC 523(a)(5)(A), which limits nondischargeability to obligations created in the usual manners in a divorce proceeding. However, this language was changed by the Bankruptcy Amendments and Federal Judgeship Act of 1984. Federal statute 11 USC 523(a)(5)(A) now provides that debts in connection with "an order of a court of record" that are "assigned to the Federal Government or to a State or any political subdivision of such State" are nondischargeable. The effective date of the change was October 8, 1984.

One important issue remains: how does the change in law affects those absent parents who filed petitions in bankruptcy during the period in which all assigned child support arrearages were dischargeable. In Matter of Reynolds, 726 F2d 1420 (CA9, 1984), the 9th Circuit U.S. Court of Appeals held that the change in law applied to actions that were pending in bankruptcy court when the change in law occurred. The court found a Congressional intent for such a holding in the 1981 Act's language, which made the amendments dealing with dischargeability effective immediately upon enactment (August 13, 1981).

PROPERTY EXEMPT FROM EXECUTION

Many States have laws that make homestead items, which are exempt from execution by general creditors, subject to execution for collection of child support. [See, for example, sec. 452.140 RSMO (1978).] Some courts are willing to create such an exception without statutory support. Although Nevada law does not contain a provision like this, the Nevada Supreme Court had an opportunity to examine the applicability of the homestead exemptions in a mother's action to collect approximately $90,000 in child support arrearages which had accrued under an Indiana order. After the mother recorded her Indiana judgment in Nevada, the father filed a homestead exemption on his home, pursuant to Nevada law. The mother moved to have the exemption ruled inapplicable. On appeal, the Nevada high court ruled that to protect the father's second family at the expense of depriving his first family of the support to which it is entitled was clearly not the Nevada legislature's intent in enacting the homestead laws. A dissenting justice suggested that the legislature should be charged with enacting specific exceptions to the homestead exemption. [Breedlove v. Breedlove, 691 P2d 426 (Nev. 1984).]

Other courts have refused to create exceptions. The Louisiana Supreme Court, in Thibodeaux v. Thibodeaux, 454 So2d 813 (La. 1984), applied the anti-attachment provision of the Federal Longshoremen's and Harbor Workers' Compensation Act to prohibit the custodial parent from garnishing the absent parent's disability benefits for overdue child support. [See also Putz v. Putz, 572 P2d 970 (Okla. 1977).]

CHALLENGES TO STATE'S AUTHORITY

Many State constitutions prohibit legislative grants of public money, property, or credit to private persons. These provisions often make specific exceptions for grants of public assistance to the needy. Two State supreme courts have addressed defenses raised by obligors that statutes authorizing State officials to bring child support collection actions on behalf of non-AFDC obligees violate such constitutional provisions. In both Johnson v. Johnson, 634 P2d 877 (Wash. 1981), and Leet v. Leet, 624 SW2d 21 (Mo. 1981), the high courts held that the State statutes authorizing support enforcement services on behalf of families who are not receiving public assistance further the compelling public interests of safeguarding children's constitutional rights, protecting the taxpayers from additional public assistance expenditures, and assuring that the primary child support obligation falls on the parents. Both courts held the constitutional provisions inapplicable due to these overriding public purposes.

Stating similar reasons, the Florida Supreme Court, in Florida Department of Health and Rehabilitative Services v. Heffler, 382 So2d 301 (Fla. 1980), held that a statute allowing the State to provide child support collection and paternity determination services to unwed mothers who are not receiving public assistance does not violate the equal protection guarantee of the State constitution.

In another light, the Oregon Court of Appeals addressed the authority of the State IV-D agency to collect child support arrearages that accrued prior to the effective date of the State statute requiring AFDC applicants to assign their support rights. In Butchko v. Butchko, 602 P2d 672 (Ore. 1979), the court held that the assignment statute was remedial and did not affect the obligor's substantive rights and that the assignment included both prospective and accrued unpaid support. The State was entitled to enforce collection of assigned support regardless of whether the support accrued or the AFDC was given prior to the effective date of the statute.

In State ex rel. Williams v. Williams, 647 SW2d 590 (Mo.App. 1983), the Missouri Court of Appeals found that the obligor did not have standing to challenge the validity or authenticity of the obligee's assignment of support rights.

THE VALIDITY OF THE SUPPORT ORDER

If the rendering court did not have personal jurisdiction over the absent parent at the time the child support order was entered, the obligor will attack the validity of the support order. Personal jurisdiction may have been obtained by consent (voluntary entry of appearance), personal service within the State, or long-arm jurisdiction based on the absent parent's minimum contacts sufficient to meet the due-process test as enunciated in International Shoe Company v. State of Washington, 326 US 310 (1945). As the court found in U.S. v. Morton, 104 S.Ct. 2769 (1984), personal jurisdiction over a serviceman residing in Alaska was obtained by the Alabama divorce court based on his prior residence there and his having filed two State income tax returns in Alabama. The U.S. Superior Court, in a decision that reversed the U.S. Court of Appeals, declared that the obligor was domiciled in Alabama and did reside in or have sufficient contacts with the State at the time the divorce court attempted to obtain personal jurisdiction. Therefore, the money judgment rendered by the Alabama court could be enforced.

FOOTNOTE

/1/ L. Simpson, Contracts 419 (2nd ed. 1965).

CHAPTER 8

Expedited Processes

INTRODUCTION

The Child Support Enforcement Amendments of 1984 require each State to enact and implement expedited processes for establishing and enforcing child support obligations and, at the State's option, to establish paternity. Federal regulation 45 CFR 303.101(a) defines expedited processes as "administrative or expedited judicial processes . . . which increase effectiveness and meet processing times specified in paragraph (b)(2) of this section and under which the presiding officer is not a judge of the court." Expedited processes must be in effect by October 1, 1985, or, if legislation is required, at the beginning of the 4th month after the end of the first State legislative session that ends on or after October 1, 1985.[1]

After implementation, actions to establish or enforce support obligations in IV-D cases must be completed from time of filing to time of disposition within the following time frames: 90 percent in 3 months, 98 percent in 6 months, and 100 percent in 12 months. [45 CFR 303.101(b)(2).] These standards were approved by the House of Delegates of the American Bar Association (ABA) and adapted by the Office of Child Support Enforcement (OCSE) for use in child support enforcement. The ABA considers the standards to be an appropriate measure of the length of time in which domestic relations cases should be completed from case filing to deposition. This chapter briefly describes two expedited process models existing in various States as of the date this Handbook is published.

As we discuss in Chapters 6 and 9, the Child Support Enforcement Amendments of 1984 require each State to establish a mandatory wage withholding procedure and apply it to each case in which an absent parent is delinquent in child support payments in excess of 1 month's support. This mechanism must be applied in both interstate and intrastate cases. As a result of these two requirements, States will be enforcing orders which were created in other States by way of establishment procedures that may differ considerably from the procedures in use in the enforcing State. Attorneys who represent absent parents will be unfamiliar and often uncomfortable with the establishment procedures used in other States and may challenge the validity of an order established through one of these variant procedures. Thus, all program attorneys must become familiar with all the procedures, the arguments attorneys will use to attack their validity, and the counterarguments to fend off such attacks.

EXPEDITED JUDICIAL PROCESSES

The concept of an expedited judicial process for child support establishment and enforcement has been in existence since at least 1919, when the Michigan legislature authorized its Friend of the Court System. [See Mich.Comp.Law Ann., secs. 552.251 to 552.255.] Other States with similar provisions include Delaware, Indiana, Minnesota, Nebraska, New York, Pennsylvania, Rhode Island, Texas, Utah, and Wisconsin.[2] Of these States, Delaware, Michigan, Pennsylvania, Rhode Island, and Wisconsin have implemented the process as their main or exclusive establishment and enforcement mechanism.

For this discussion, we define expedited judicial process as a legal process in effect under a State judicial system that reduces the processing time of support order establishment and enforcement effort pursued through full judicial process. To expedite case processing, our model concept assumes judge surrogates with minimum authority to:

- Take testimony and establish a record
- Evaluate and make initial decisions
- Enter default orders if the absent parent does not respond to notice or other State process in a timely manner
- Accept voluntary acknowledgment of support liability and approve stipulated agreements to pay support, and if the State establishes paternity using quasi-judicial process, authority to accept voluntary acknowledgment of paternity.

Judge surrogates often are referred to as court masters, referees, hearing officers, commissioners, or presiding officers with the above described authority.

Pennsylvania Procedures

State statutes that authorize the appointment of judge surrogates can be so general as to provide only the authority without much direction, or may be so specific as to set out the procedure in great detail. When the statute is general, the judiciary normally will fill in the details with court rules. The Pennsylvania statute and court rules describe a typical expedited judicial process. [See Pa. Rules of Civil Procedure, secs. 1910.10 to 1910.13.]

The rules provide two alternatives from which each judicial circuit may choose. The first option provides for a mandatory office conference in each child support establishment or enforcement case, presided over by a "conference officer," who need not be an attorney. If the case cannot be settled at the office conference, the matter is referred to the court for hearing. The second option also employs the office conference, but hearings in disputed cases are presided over by a master in lieu of the court. The court may review the master's decision.

The office conference provided for by Rule 1910.11 is somewhat unique; it gives the Pennsylvania procedure the look, and some of the advantages of, the administrative process (discussed below). There are two advantages to requiring such a conference. First, in a large percentage of cases, the parties will agree on an amount of support, and a final order will be prepared to be entered by the court without a judicial hearing. Second, the process of preparing for and conducting the office conference will allow the conference officer to conduct informal discovery into the facts of the case. Should thematter go before the judge, the court file should contain complete information for the judge and the attorneys to refer to during the court hearing. The court hearing no longer functions as an "intake interview," except with respect to hotly contested issues.

To strike a balance between fairness and efficiency, the Pennsylvania rules reflect several policy decisions with respect to the scope of the conference and the authority and function of the conference officer. The procedure makes maximum use of the conference, including recommendations by the conference officer as to the entry of an order and the amount. The court may act on the recommendation, subject to review de novo upon written request, or the court may defer action, in which case a hearing automatically follows.

Important innovative features of Pennsylvania's conference procedure are as follows:

- The order attached to the complaint directs the parties to bring to the conference certain documents, including their most recent Federal Income Tax return, their pay stubs for the preceding 6 months, and a completed income and expense statement. This information establishes a meaningful basis for the conference.

- The conference officer may make an informal recommendation to the parties as to the amount of support that should be ordered. If an agreement is reached, the officer will prepare a written order conforming to the agreement. The signatures of the parties appear on the proposed order to signify their agreement. The court, in its discretion, then may enter the order as the final order of support without further hearing.

- Even if the parties agree on an amount of support, the officer is still empowered to recommend that the court disapprove the agreement. This authority encourages the conference officer to fulfill the traditional judicial function as protector of the best interests of the child(ren), and prevents a destitute spouse from agreeing to the entry of an unreasonably low order in exchange for some other item or right.

- Where the parties do not reach an agreement for a support order, the officer prepares a conference summary and recommendation to be furnished to the court and, upon request, to the parties. It contains the facts upon which the parties agree, their contentions with respect to disputed issues, and the recommendation as to the amount and effective date of a support order. The file and summary then are transmitted to the court.

- The judge reviews the file and conference summary to determine whether a support order should be entered and, if so, whether the recommendation of the conference officer is appropriate. After careful consideration, the court may decline to enter an order, enteran order based upon the recommendation, or enter an order which varies from the recommendation. If the court declines to enter an order, then a hearing will be held before the court without further action by the parties.

- If the court enters an order based on the file and conference summary without hearing the parties, the Rule requires that the order notify the parties of their right to demand a hearing de novo before the court, and the procedure that must be followed in order to demand a hearing. The order, however, remains in effect as a temporary order pending the hearing, unless the court grants a stay. If an order is entered and no party files a demand for hearing, then the order becomes a final order.

In judicial districts that have opted for the alternative hearing procedure, there is again an office conference, but the conference officer does not file a report and recommendations. If the office conference fails to produce an agreement, the matter is referred to the permanent hearing officer, who must be an attorney the parties are notified of the date, time, and place of the hearing. Prior to the hearing, the parties may request discovery in order to gather additional information not disclosed at the office conference.

The permanent hearing officer acts as a judge surrogate to receive evidence, rule on objections, hear arguments, and file with the court a report containing a recommendation as to the terms of a support order. Rule 1910.12(b) requires a stenographic record of the trial to preserve the testimony for possible subsequent judicial review. The hearing proceeds in a manner substantially similar to a regular court hearing, sometimes even using a courtroom as a setting. Both sides typically are represented by counsel. The permanent hearing officer is an impartial participant at the hearing with the additional charge of protecting the best interests of the child. The normal rules of evidence apply.

After the hearing, the hearing officer prepares a report and recommendations. The report may be in narrative form, but must set forth the specific terms of the order, such as the amount of support, by and for whom it is to be paid, and its effective date. A copy of the report is furnished to all parties.

Within 10 days of the hearing, any party may file exceptions to the report, to the permanent hearing officer's rulings on the admissibility of evidence, to statements or findings of facts, to conclusions of law, or to any other matters occurring during the hearing. If no exceptions are filed within the 10-day period, the court must review the report and, with the judge's approval, enter a final order.

If exceptions are filed, the court reviews the record placed before the hearing officer, as prepared and submitted by the parties. There is no de novo hearing before the court. Like the appellate court in a regular judicial process, the court hears oral argument and enters a final order. The court generally will refrain from substituting its opinion for that of the hearing officer regarding issues of fact, especially where the credibility or oral testimony may have affected the hearing officer's decision. If the court finds insufficient evidence in the record to support the hearing officer's decision, the court may remand the case for further proceedings before the hearing officer. The court normally will deviate from the recommendation of the hearing officer only where it finds that the hearing officer's report and recommendations contain a mistake of law.

Rule 1910.12 provides that the order entered by the court after hearing argument and reviewing the record is final, and that the court may not accept a Motion for Post Trial Relief. If a party disagrees with both the hearing officer's report and the final order entered by the court, he or she must seek relief in the appellate courts.

Variations in Other States

As noted above, in addition to Pennsylvania, the States of Delaware, Michigan, Rhode Island, and Wisconsin use expedited judicial systems extensively in the establishment and enforcement of child support obligations. The systems in these States resemble the Pennsylvania procedure; only Pennsylvania, however, has formalized the office conference procedure such that it can result in an enforceable order in default situations. While the authority of the judge surrogates varies from State to State, they generally have the authority to (1) hold hearings and compel witnesses; (2) enter orders or recommend orders to the court; and (3) make findings of fact in divorce, annulment, and separation cases, child support and maintenance cases, paternity cases, child abandonment and neglect cases, and juvenile justice cases.[3] Some of the States also have authorized judge surrogates to conduct hearings and make findings and recommendations in interstate cases, a requirement under the Child Support Enforcement Amendments of 1984.

One advantage of an expedited judicial process that extends to areas other than child support and paternity is its ability to resolve collateral issues, such as visitation, while a child support or paternity proceeding is pending. This may not maximize the system's responsiveness to the child support caseload, but it does provide a procedural avenue to absent parents who might otherwise feel the system is one-sided.

Several States have combined their expedited judicial process with local court administration of many IV-D responsibilities. In Michigan, for example, the Friend of the Court System has been in effect since 1919 to supervise child custody, visitation, and support cases. The office of the Friend of the Court also receives, disburses, and monitors payments, and investigates and prosecutes absent parents who fail to comply with their support obligations. The Friend of the Court, hired and supervised by the court, also supervisesthe preparation of reports to the court regarding custody and visitation issues. The court also has the authority to appoint referees to act as judge surrogates in proceedings initiated by the Friend of the Court or referred by the court.

ADMINISTRATIVE PROCESS

All State legislatures have the authority to set up executive agencies or boards to resolve disputes and claims. These agencies or boards are governed by administrative law, the branch of public law that deals with the limits placed on the powers and actions of administrative agencies. In addition, all States have the capacity to devise and implement procedures for operating these agencies or boards. These procedures, which vary from State to State and from agency to agency, constitute administrative processes.

The use of administrative processes for establishing and enforcing child support obligations is a relatively recent occurrence. However, the general concept is as old as the Republic itself. The First Congress of the United States, meeting in 1789, enacted legislation authorizing administrative officers to regulate imports and determine import duties, and to adjudicate claims to military pensions for invalids who were wounded and disabled during the Revolutionary War. By the Nation's 1976 bicentennial, the Federal administrative process had achieved considerable status, embracing more than 60 independent regulatory agencies and several hundred administrative agencies in the executive department. The administrative process also has been applied within State governments. The workers' compensation and State tax enforcement programs illustrate State-level applications of this concept.

Significant parallels can be drawn between these two historic examples and the use of administrative processes to resolve child support disputes. Injured workers were plagued by increasing compensation claims, long court delays, and disparate awards for similar injuries; child support obligees suffer from similar problems. While child support caseloads have exploded due to increased reliance on welfare by families who are not being supported, child support cases have become bogged down in the courts. Moreover, child support determinations made by the courts show little uniformity. Yet, objective criteria for child support obligations seem amenable to a systematic approach which, in turn, would result in more uniform and, thus, fairer child support determinations.

The enforcement of child support obligations also has taken on increased importance to States as welfare expenditures support children when parents should but do not. States have begun to realize that enforcing child support obligations has the same importance as enforcing tax obligations. The administrative child support process can relieve the courts of this overwhelming caseload and place it in a specialized executive agency, where, because of the agency's limited scope, obligations can be determined systematically and uniformly and enforced efficiently when they are not met. Sixteen States have enacted legislation allowing administrative establishment or enforcement of child support orders. Most of these States use the process almost exclusively in the appropriate cases.

Definition

For the purposes of this discussion, "administrative process" is defined as a statutory system granting authority to an administrative agency to determine paternity and to establish and enforce child support orders. This definition is understood best by analyzing each phrase.

A statutory system. State legislatures must enact statutes authorizing the administrative process. State constitutions prohibit agencies from assuming legislative or judicial authority without specific statutory delegations. Before an agency is authorized to determine support obligations by establishing rules of general applicability and by applying those rules to specific cases, a statute must be in place.

Granting authority to an administrative agency. The statute must authorize the agency to make determinations in contested cases and must provide some manner of enforcing these determinations.

In addition, when a State legislature gives a State agency the authority to act in a judicial capacity, there are usually some substantive and procedural matters too detailed for the legislature to address specifically in the law. So that the agency may address these matters, the legislature also gives the agency rulemaking authority. Rules promulgated by an agency under that authority carry the weight of law. Thus, in an administrative process, a State agency acts in both judicial and legislative capacities.

The "administrative" or "executive" agency is usually a subdivision of a State's executive branch, such as the human services department, the revenue and taxation department, or any other agency reporting to the Governor. However, the agency may report to another executive official such as the Attorney General or the State treasurer or to a commission created and supervised by the legislature. Most child support enforcement agencies are within the State social or human services agency. (In this publication, administrative agency, executive agency, and State agency all refer to the State agency that administers the Child Support Enforcement Program.)

Determination of paternity. The executive agency may be granted the authority to determine paternity in addition to setting child support obligations. Clearly, a formal, judicial-type hearing is necessary to establish paternity when the alleged father contests the issue. The agency also may be authorized to establish paternity without holding a hearing in uncontested cases, in cases where the alleged father has acknowledged paternity in writing, and in cases where the alleged father and the mother have married after the birth of the child.

Establishment and enforcement of orders. Through administrative adjudication, the executive agency can enter an order similar to a court order requiring the parent to pay a specific amount of child support per month and to repay the State for public assistance paid to his or her family in the past. Once the order is entered, if the parent fails to pay, the executive agency may be entitled to withhold the parent's wages, or to seize other property and credits to collect the money due.

Constitutionality

Placing traditionally judicial functions in an executive agency raises some questions, and the question most often heard is, "Are administrative determinations of child support obligations constitutional?" Those who ask this question generally are expressing two major areas of concern:

- May the legislature delegate this traditionally judicial area to the executive branch of government?
- May child support obligations be established and enforced by an executive agency without violating a responsible parent's right to due process of law?

The first question is one of State constitutional law. The answer depends on the authority the State's constitution gives to the State legislature. Generally, State legislatures have broad authority to determine the rights and responsibilities of its citizens and to establish processes for enforcing those rights and responsibilities. Certainly, if a State has a workers' compensation statute, there is precedent for placing previously judicial functions in an executive agency. Many State supreme courts have had the opportunity to consider whether delegating the authority to resolve workers' compensation claims to an administrative agency violates the State constitution. Such delegations have not been held to violate State constitutional restrictions.

The second question raises a more fundamental Federal (and State) constitutional problem. The 14th Amendment to the U.S. Constitution provides that a person "shall not be deprived of life, liberty, or property without due process of law." The U.S. Supreme Court has established some very important criteria for due process. These fall into three general areas:

- Right to notice
- Right to a hearing
- Right to judicial review of administrative action.

A person has a right to be notified of any action being taken that concerns his or her liberty or property. All child support administrative processes require the executive agency to notify the responsible parent of the amount being claimed and the procedure for contesting the claim. These statutes further require that the executive agency serve the notice in a manner reasonably calculated to give the responsible parent actual notice.[4]

The courts also have specified the type and quality of hearing necessary before a person is deprived of property. The hearing must be fair and impartial, and the person entitled to the hearing must have reasonable opportunity to present evidence through documents or witnesses, confront the opposing party, and refute any evidence.[5]

Administrative processes, as presently being used, allow the alleged responsible parent to present all evidence in his or her favor with the aid of an attorney if desired.

The administrative decision must be in writing and must be based solely on evidence submitted at the hearing.[6] A proper hearing includes the right to appeal to a judicial authority. In all administrative child support processes, the responsible parent may request that a higher authority review the facts on which an order is based or the law which was applied. In all the processes, questions of law may be appealed to the judiciary.

Establishing Obligations

The administrative process may be used to establish the initial support obligation in cases that do not already include court-ordered support, and it may be used to determine the amount of arrearages due under an existing judicial order. The procedural steps for obtaining the administrative order under these two situations are similar.

The child support agency first must locate the absent parent prior to considering the case for administrative process. Usually the agency will conduct an initial inquiry into the absent parent's financial situation through information available from other State agencies (e.g., taxation or employment security) or from formal or statutorily mandated devices such as absent parent financial statements or employer reports. This information may be used to compute the amount of the child support obligation where no order exists, or to locate income or assets for enforcement of an existing administrative or judicial order. Once the absent parent is located, the State child support agency will prepare a notice of the child support obligation, and the typical administrative process will follow the five steps described below.

Step 1: The notice of child support obligation. The State agency obtains jurisdiction over the absent parent by serving on him or her a notice of the child support obligation either by personal service, certified mail, return receipt requested. (Some States allow service by first class mail.) Under existing State statutes, the Notice must contain, at a minimum:

- The names of the children for whom support is sought
- The rights of the absent parent, including the rights to a hearing and representation by an attorney
- Notice that a default order can be entered if the absent parent does not respond to the notice
- Notice that the absent parent must respond within a reasonable period of time specified by the statute
- Notice that the absent parent may appeal an administrative determination to a court of competent jurisdiction
- An allegation of debt owed to the State for past assistance provided to the parent's dependents (often referred to as "State debt")
- The amount of current support to be paid, based on a formula required by 45 CFR 302.53, or arrearages that have accrued under an existing order

- Instructions on how to obtain a negotiation conference
- A listing of the various collection actions that may be instituted once the administrative order is entered.

Step 2: The absent parent's response. The absent parent may respond to the Notice in one of four ways:

- He or she may fail to take any action within the time specified in the notice, in which case he or she will be in default. The agency then may enter a default administrative order in the amount alleged in the notice.
- He or she may consent to pay the amount requested in the notice, in which case the agency will enter a "consent" or "stipulated" administrative order consistent with the notice.
- He or she may request a negotiation conference with the agency at which he or she will argue for a support amount different from that requested in the notice. If negotiation is successful, the absent parent and the agency will enter into a "consent" or "stipulated" administrative order.
- If the amount of child support, State debt (or payments to be made on the State debt), or arrearages due cannot be agreed on during negotiation, or if the absent parent refuses to negotiate, he or she may request a hearing by filing a formal request within the time set by statute. If the absent parent does not request a hearing, the agency may enter a default administrative order, based on the obligation alleged in the notice.

Step 3: The administrative hearing. When the absent parent makes a timely request for a hearing, the case is scheduled before an administrative hearing officer. Usually, the agency worker or an attorney represents the agency in the administrative hearing, and the absent parent represents himself or herself or is represented by an attorney.

The administrative hearing officer is a State employee, usually appointed by the agency director. The State statute may provide that hearing officers be employed by a separate agency, such as the Attorney General's Office. The hearing officer represents no one, and conducts and controls the hearing as an impartial examiner of the facts. The administrative hearing usually must be a hearing of record. A file is maintained; all pleadings, memorandums, and physical evidence are labeled, and all testimony is recorded. Most often, the hearing is tape-recorded. The record is preserved for a period prescribed by statute or rule, and is transcribed for review if the absent parent appeals the hearing officer's decision.

The rules of evidence in an administrative hearing are less formal than in court. Most States have enacted a version of the "Revised Model State Administrative Procedure Act" (APA). Sometimes the APA is cross-referenced in the administrative child support statute so that its procedural provisions apply. The APA describes the form (oral testimony, documents, and affidavits) and the admissibility of evidence. Evidence not normally admissible in a court of law (certain types of hearsay, for example) may be admitted by an administrative hearing officer if he or she determines that the evidence is reasonably reliable. The hearing officer may take notice of the same matters of which a court may take judicial notice.

In an administrative hearing, as in civil judicial proceedings, the burden of proof or "risk of nonpersuasion" is generally on the party who initiates the action (i.e., the State agency). This means that the agency first presents evidence which establishes its case, and then the absent parent attempts to counter this evidence. As specific elements of a case, the State may want to show that the absent parent owes a duty of support, that the absent parent has not complied with an existing court order, the absent parent's ability to provide support, and the State's interest in the proceeding. The absent parent may cross examine the State's witnesses and present his or her own evidence, which the State may rebut. The hearing officer weighs the evidence and rules in favor of the State or the absent parent, depending on whose evidence is more persuasive.

Some State administrative process statutes impose a "show cause" requirement on the absent parent. This lessens the agency's burden of proof by requiring the absent parent to prove that he or she should not be required to meet the agency's demands, or that he or she does not owe the amount of support arrearages claimed. In this case, if the absent parent does not "show cause" why the administrative order should not be entered in the amount requested, the hearing officer must rule in favor of the agency.

Step 4: The administrative order. The final decision and order recites, in writing, pertinent facts of the case (e.g., names, birthdates, employer, and income) and the legal conclusions drawn (e.g., duty of support, amount of the obligation, and arrearages). The order also contains important information, such as where, how, and when support payments are to be made; the consequences of nonpayment; and notification to the absent parent of his or her right to, and the method and time limits in applying for, review of the agency's decision. The order may be filed with the court, or it may be maintained internally by the agency, depending on the statute.

Step 5: Review of the administrative order. Most States' administrative process statutes contain specific provisions describing the nature of review available and how review must be requested. Most States provide for direct judicial review of the administrative order, although some allow for an initial internal agency review by an agency official or review board.

Regardless of specific statutory provisions for judicial review, all executive agency decisions that affect an individual's rights or property are subject to judicial scrutiny. Review ensures that statutory procedures have been followed, that Constitutional rights have been protected, and that the agency's decision is supported by substantial evidence. If the administrative process statutes of the State do not specify a review process, nonstatutory remedies developed by the courts may apply (e.g., writs of prohibition, certiorari, or mandamus). In addition, if the administrative process statute or State APA do not specify a procedure for requesting judicial review of the agency's order, the absent parent may apply to the courts for equitable relief against the enforcement of the administrative order and may challenge the validity of the administrative order.

State statutes commonly provide for judicial review "on the record." If the absent parent requests judicial review, the agency prepares a complete record of the administrative proceedings, including all documents filed and a transcript of all oral testimony. The parties may file briefs and make oral arguments before the court, and the court examines the record and considers legal arguments. The court may affirm the agency's decision, or remand (return) the case to the administrative agency for a new hearing or a new order to be entered in compliance with the court's findings. In this type of judicial review, the court generally does not weigh the evidence again and substitute its judgment for that of the hearing officer. The court may reverse or modify the agency decision only if substantial rights of the absent parent have been prejudiced during the administrative hearing, or if the administrative decision violates statutory or constitutional provisions, exceeds the agency's statutory authority, or is not supported by substantial evidence. Alaska and Virginia allow the court the option of either reviewing the agency record or holding a hearing de novo.

Some States allow an agency official or agency review board to review the administrative order. Under this type of review, the official or board may exercise a review on the record, much like the judicial review on the record, or the agency may allow an administrative hearing de novo. If there is a provision for internal review of the administrative order, the absent parent generally must exhaust all administrative remedies before seeking judicial review.

Administrative Enforcement Mechanisms

Administrative remedies differ from judicial remedies in that they are imposed by the agency in lieu of the courts. Existing administrative process statutes have established a number of administrative enforcement remedies. Statutes vary concerning the procedures the agency must complete in order to affect the noncomplying parent's property. Below are summaries of existing administrative remedies.

Administrative garnishment. The most common administrative enforcement remedy, an "Order to Withhold and Deliver," is used to seize property (usually money) belonging to an absent parent that is in the possession of a third party (e.g., employer, bank, credit union). The order is issued by an agency official and usually served by certified or regular mail on the person or officer of the company in possession of the absent parent's property. Typically, the order will recite identifying information about the absent parent, the amount to be withheld, the amount and types of property exempt from withholding, the procedure for delivering the property to the agency or court clerk, and information describing the withholder's liability for failing to comply with the Order to Withhold and Deliver. The most commonly used Order to Withhold is for wages. This type of order is continuous and may remain in effect for the entire life of the support order.

The most commonly used Order to Withhold is for wages. This type of order is continuous and may remain in effect for the entire life of the support order. Under the 1984 Amendments, mandatory wage withholding will be the preferred enforcement remedy in all child support enforcement agencies. All newly established or modified support orders must include mandatory wage withholding as an automatic condition when an absent parent becomes delinquent in paying child support.

Administrative liens. The statute may prescribe a procedure for recording a lien against a noncomplying absent parent's real and personal property. The lien usually is accomplished by filing a document with the court clerk or county recorder of deeds in the county in which the property is located, similar to the State's procedure for creating judgment liens. The lien encumbers property so that, if the absent parent attempts to mortgage or sell the property, a title search will reveal the lien. In practice, the absent parent or the purchaser of the property usually will pay off the support arrearage in order to release the lien, so that the property will not be subject to seizure and sale by the agency or the support obligee.

Seizure and sale of property. Some existing administrative process statutes provide that once a lien is recorded, the agency may take possession of the absent parent's personal property (e.g., automobiles, guns, jewelry) and may advertise his or her real property for sale. The procedure is similar to seizure and sale (or levy and execution) under the State's civil law mechanisms for collecting judgment debts. In administrative seizure and sale, the child support enforcement agency, rather than the court, authorizes and carries out the seizure of the property and advertises and holds the sale. The sale proceeds, less the costs of seizing the property and holding the sale, are applied to reduce or satisfy the support arrearages.

Income tax refund setoff and interception. Support arrearages which accrue under an administrative order may be submitted to the Internal Revenue Service for income tax refund setoff under 42 USC 664 and Section 6402 of the Internal Revenue Code. In addition, 42 USC 666(a)(3) requires States to implement a similar setoff procedure for State income tax refunds. This procedure will include an administrative review process for settling contested tax refund interceptions. The same hearing officers who conduct hearings for establishing and enforcing support obligations also often conduct contested tax refund reviews.

Enforcing Judicial Orders Administratively

Many administrative process statutes allow the child support agency to enforce prior judicial support orders through some or all of the enforcement means described above. The agency must notify an absent parent prior to using an administrative remedy to enforce a judicial order, but the statute does not always spell out specific hearing procedures. Some statutes require the agency to complete the statutory procedures for establishing an administrative order before using administrative remedies to enforce a judicial order. Other statutes require the agency merely to notify the absent parent of the impending enforcement action. With this latter procedure, the absent parent's sole method of contesting the administrative enforcement is to seek relief in the court which entered the order.

Judicial Enforcement of Administrative Orders

Some administrative process statutes allow the agency to file its order with a court in the county in which the children or absent parent reside. Once filed, the order becomes an enforceable order of the court as though it had been rendered by a judge. In these States, which include Utah, Missouri, and Oregon, traditional judicial enforcement mechanisms are available in addition to any administrative enforcement remedies provided for by statute.

Modifications

Some administrative process statutes allow the agency to modify administratively entered child support orders. The statute will specify the criteria and the procedures for notice and hearing in an administrative modification proceeding. Generally, once the notice provisions have been met, a modification proceeding follows the same methods for hearing and review as for administrative establishment, with the additional requirement that the party seeking the modification must prove a change of circumstances.

Appellate Decisions Involving Administrative Process

To date, seven appellate decisions have been rendered in States that use administrative processes for child support establishment and enforcement. Five of the decisions are from the State of Washington, two from Utah.

The first Washington case is Taylor v. Morris, 564 P2d 795 (Wash. en banc, 1977). The issue here was simple: Did the Washington administrative process statute (RCW 74.20A) confer upon the Department of Social Services the authority to determine administratively the question of paternity? The statute did not expressly confer such authority, but the Department argued that it was implied necessarily by the statute, which did expressly authorize the Department's hearing officer to "determine the liability and responsibility, if any, of the alleged responsible parent." The court held that the statute was aimed toward the quantification and enforcement of the support obligations of "responsible parents" and not determinations of parentage itself.

Woolery v. Department of Social and Health Services, 612 P2d 1 (Wash. App. 1980), followed the Taylor case to prevent the Washington IV-A agency from determining administratively the paternity of the Woolery children in a IV-A eligibility hearing. The issue was whether the father of the children was in the home during a period of time when Mrs. Woolery was drawing AFDC. Although the case concerned a different administrative process, the decision strengthened the concept laid out by the Washington Supreme Court in Taylor.

Whitehead v. Department of Social and Health Services, 595 P2d 926 (Wash. en banc, 1979) involved a construction of the appeal mechanisms afforded to responsible parents by the Washington statute, and whether attorney's fees are available to reduce the cost to the responsible parent of an appeal from the decision of an administrative hearing officer. The decision is probably peculiar to the Washington administrative process statute, which authorizes such appeals by reference to another Washington statute. The incorporated statute contains the attorney's fee provision, not the administrative process statute. Nevertheless, the decision held that attorney's fees are available to aid the absent parent in seeking judicial review.

The fourth Washington case, Powers v. Department of Social and Health Services, 648 P2d 439 (Wash.App. 1982), deals with the effect of an existing custody and support decree on the IV-D agency's authority to use its administrative process statute to establish a current obligation and to enter judgment for reimbursement of AFDC paid to the family prior to entry of the administrative order. The facts were not unusual. A divorce decree gave custody to the mother and ordered the father to pay $150 per month ($50 per month per child). Subsequently, the decree was modified to transfer custody to the father. Several years later, the mother picked up the children without the father's consent and later began drawing AFDC.

The Washington IV-D agency treated the case as though no support order existed, and served the father with a "Notice and Finding of Financial Responsibility." The administrative hearing officer ordered the father to pay $315 per month current support and to repay accrued a State debt (unreimbursed prior AFDC) of $4,899.80 in installments of $70 per month.

The decision has positive and negative implications. On the positive side, the court did not allow the father's legal custody to insulate him from the IV-D agency's claim. On the other hand, the court limited the claim to $150 per month, despite the fact that the support provision of the divorce decree had been modified out of existence.

The fifth Washington case is Duranceau v. Wallace, 743 F2d 709, 10 FLR 1684 (CA9 1984). Here, the 9th Circuit Court held that the administrative garnishment procedure authorized by Washington's administrative process statute does not violate the absent parent's right to due-process. The decision analyzes the due process factors contained in the U.S. Supreme Court's decision in Mathews v. Eldridge, 424 US 319 (1976), to determine the notice and hearing rights of an absent parent in an administrative enforcement proceeding. The Washington statute allows for administrative enforcement of existing judicial orders by way of a summary procedure. The Washington IV-D agency may initiate enforcement of a judicial order simply by notifying the obligor of the amount due under the order and that his property is subject to collection action. [R.C.W. Sec. 74.20A.040.] After the expiration of a 20-day waiting period, the agency may serve the administrative garnishment (called an "order to withhold and deliver") on the obligor's employer, who is directed to turn the obligor's wages or property over to the agency after another 20 days expires. [R.C.W. Sec. 74.20A.080.]

The absent parent argued that the agency violated due process in failing to grant him a prompt postgarnishment hearing and to inform him fully as to all available exemptions which would insulate his property from the garnishment. The court rejected both arguments, stating:

> Because of the strong governmental interest in the support of children and the expeditious enforcement of judgments, the relatively small risk of erroneous deprivation, and the negligible value of alternative procedures we find that the present procedures do not violate due process.

The court held that informal communications between the agency and the obligor were sufficient (i.e., no formal administrative hearing, prompt or otherwise, is required) given the obligor's alternative to seek immediate judicial relief in the court that entered the support order. The court further held that the notice, which stated "in summary" the wage exemptions available to the obligor and which advised the obligor to seek judicial relief "on the basis that no support debt is due and owing," were sufficient to notify him or her of available defenses and the procedure for asserting them.

The two Utah case are likewise instructive. Pilcher v. Dept. of Social Services, 663 P2d 450 (Utah 1983), treated several important issues. First, the Utah Supreme Court noted that the purpose of the administrative remedy is not furthered by application of the technical rules of pleading and procedure used by the courts. The opinion ratified the use of an amended Notice and Finding after service of the initial Notice on the absent parent to change the amount of support prayed for, even though the statute provided for no such amended pleading.

Next, the decision concluded that the IV-D agency was well within its authority in basing the support amounts contained in the Notice and Finding on a Texas court order. This has the effect of allowing administrative registration of an out-of-State court order, which gives the agency a bit more flexibility in using the administrative process.

The most important facet of the opinion holds that the procedure may be implemented retroactively to create administrative orders for amounts owed prior to the effective date of the statute. The court noted that the administrative process statute was remedial, simply providing a new procedure to enforce a preexisting obligation. That being the case, retroactive application offends no constitutional principle.

The facts in Pilcher involved converting court-ordered arrearages into an administrative order. The logic of the decision as to retroactivity also should apply to the creation of a "State debt" (based on the amount of AFDC benefits provided to the family) for a prior period during which no court order was in effect, at least in States where a common law "reimbursement of necessaries" action exists.

The other Utah case is Knudson v. Utah Department of Social Services, 660 P2d 258 (Utah 1983). The decision holds that the entry of a divorce decree which makes no mention of the father's obligation during the pendency of the divorce case does not prevent the IV-D agency from employing its administrative procedure to seek reimbursement of AFDC provided to the family during that period. The Utah Supreme Court held that since the issue of Mr. Knudson's obligation during the period was not actually litigated in the divorce, the doctrine of res judicata did not apply. As to the obligation to be determined in the administrative process action, no "court order" existed.

The decision contains a troublesome conclusion as well. The court concluded that the responsible parent must be given credit, against the "State debt" claim, for contributions he made to the family by way of mobile home mortgage payments, despite the fact that he retained a one-half interest in the mobile home and was accruing equity as a result of the payments. This conclusion reduces the remedy's emphasis on the State's claim for reimbursement. The statute creates a debt in the amount of AFDC provided, which then is adjusted by taking into account the responsible parent's ability to pay during the period for which reimbursement is sought. Such an adjustment complicates matters greatly. The Knudson case goes one step further by requiring the agency to give the responsible parent credit for so called "in-kind" contributions that were made to the family, despite the fact that the responsible parent had been notified that his support obligations must be channelled through the State.

A NEW ROLE FOR THE COURTS

Throughout the history of the Child Support Enforcement Program, the judiciary has been the focus of case processing activity. Judges have entered orders, established paternity, and provided the authority for all enforcement activity. The judiciary has been an important guiding force on the "front lines" of the child support enforcement effort. In mandating all States to implement expedited processes and summary wage withholding procedures, Congress has forced a change in the role judges are to play in the process.

Of course, many things will remain the same. Judges will still enter support orders in divorce proceedings, and these orders will continue to be a significant percentage of the obligations enforced by program personnel. In most States, judges will continue to preside over contested paternity proceedings; other States, no doubt, will opt to delegate the conduct of these hearings to the presiding officers in their expedited processes. Furthermore, judges will continue to sit in difficult enforcement proceedings--contempt will continue to be an important remedy against absent parents who do not have readily identifiable income or assets.

Routine establishment and enforcement should require significantly less judicial involvement. In States that enact administrative processes, trial judges generally will act in the traditional role of the appellate court. In this role, judges will oversee, on an infrequent basis, the implementation of the administrative process. Judicial involvement in States that opt for expedited judicial processes will be more extensive. In most jurisdictions judges will become involved in individual cases only rarely, upon request for review. Nevertheless, the judiciary's role as manager and overseer of the process will be crucial to the success of the new procedures. Judges often will be authorized to hire and supervise the presiding officers and other court personnel who drive the system. As such, judges must be aware of the administrative problems and needs of the program within their judicial circuit or district. The success of the process demands nothing less than a significant commitment of effort and resources, and a commitment to successful implementation.

FOOTNOTES

/1/ Exemptions are available on a statewide basis and for individual political subdivisions pursuant to 45 CFR 302.70(d) and 45 CFR 303.101(e).

/2/ 10 Dec.C. Sec. 913; Ind.Code.Ann. 31-1-23-5 (1971) and 31-1-23-6 (1973); Minn.Stat.Ann.,secs. 484.65(1977); 484.67 (1977); 484.70(1979); and 518.13(4) (1979); 25 Neb.Rev.Stat. 1129 to 1137; New York Fam.Ct. Act, sec. 439 (1979); 42 P.A.Cons.Stat.Ann., secs. 961 and 6703 (1978); R.I.Gen. Laws, sec. 8-10-3.1; Texas Rev.Civil Stats.Art. 2338-9b.2 (1975); Utah Code Ann., secs. 30-3-11.1 to 30-3-17.1 (1969); Wisc.Stat.Ann., sec. 767.13 to 767.145; 767.16 to 767.17; 767.29; and 757.69 (1979).

/3/ C. Kastner and L. Young, A Guide to State Child Support and Paternity Laws (Denver, CO: National Conference of State Legislatures, 1981).

/4/ Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

/5/ H. Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267 (June 1975), p. 1279.

/6/ Id., p. 1283.

CHAPTER 9

Interstate Cases

INTRODUCTION

The problems of establishing and enforcing a support order are compounded when the absent parent and dependent child live in different States. Jurisdictional hurdles may prevent the child's caretaker from bringing the support action in his or her home State. Yet, the child's caretaker may not be able to bear the expense of bringing an action in another State.[1]

In the past, these problems enabled absent parents to avoid child support obligations by fleeing the abandoned family's home State and remaining beyond the process of its courts. Even attempts to enforce the obligation in the absent parent's home State often were frustrated. Long-arm statutes were often inapplicable, and criminal enforcement proved defective because extradition was time consuming, expensive, and overly drastic in the eyes of those involved. As Americans have become more mobile, the interstate enforcement problem has become more acute, forcing more and more abandoned families onto the welfare roles.

Early child support legislation was ineffective. The Uniform Desertion and Nonsupport Act, drafted in 1910 by the Commissioners on Uniform State Laws and ultimately adopted in 24 States, made it a criminal offense to desert or fail to support a wife or child in need. However, the Act did not provide any civil remedies for nonsupport, nor did it provide for interstate enforcement when the father fled the State.[2]

In response to the need for a simple, inexpensive, and consistent interstate process, the Commissioners began studying the issue in 1944 and adopted the Uniform Reciprocal Enforcement of Support Act (URESA)[3] at the 1950 American Bar Association (ABA) Annual Meeting. URESA provides a uniform process for using the courts of another State without traveling to that State or becoming subject to the jurisdiction of that State's courts for other purposes. In order to achieve this, the Act establishes a two-State legal proceeding. The URESA proceeding begins with the filing of a petition in a court in the abandoned family's home State (the initiating State). The judge of that court reviews the pleadings to determine whether the allegations establish an existing duty of support and whether the responding State appears to have jurisdiction over the absent parent. If the judge finds these elements, the proceeding is certified to the proper court in the responding State, where the support obligation is established and enforced. Some States use the same procedure between two different counties within the State.

The 1950 version of URESA also provided for criminal enforcement through extradition (or "rendition" in the language of the Act).[4] The Act was amended significantly in 1952 and 1958 and revised in 1968. The 1958 amendments incorporated a registration procedure that provides for summary registration and enforcement of existing support orders in the absent parent's home State.[5] The 1968 revisions specifically provide for paternity establishment, among other things.[6]

All 50 States plus the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and American Samoa have adopted some form of URESA or similar legislation. The basic mechanics of the Act are the same in all States, but some States have modified or omitted certain sections in order to comply with existing procedures and enforcement techniques. The amendments to and revisions of the Act have been adopted by some States and not by others. Consequently, the effectiveness of the Act may depend upon the initiating State's knowledge of the responding State's capabilities and procedural necessities.[7] In addition, State IV-D agencies have shown little commitment to interstate establishment and enforcement in the past, and State courts, when acting as a responding jurisdiction in a URESA proceeding, have been a frequent haven for noncomplying absent parents. As a result, the original aims of the Commissioners have remained unfulfilled.[8]

Congress reacted to this problem with the Child Support Enforcement Amendments of 1984 (P.L. 98-378), which contain several provisions pertaining to interstate support enforcement, as follows:

- States must enact and implement procedures for interstate wage withholding.
- States must enact and implement other proven enforcement techniques and apply them to interstate cases. [See Chapter 6.]
- States must enact and implement expedited judicial or administrative processes and use them for interstate establishment and enforcement.
- Federal incentive payments will accrue to both States involved in an interstate case.
- Federal funds will be available to support special demonstration projects testing innovative methods of interstate enforcement and collection.
- Federal tax refund interceptions, a powerful interstate remedy, will be available for non-AFDC IV-D cases beginning with tax refunds payable after December 31, 1985, and before January 1, 1991.

These mandatory improvements should make interstate enforcement a more uniform and effective procedure. No longer will orders need to be established in cases where an order already exists, and no longer will obligors have an opportunity to convince a responding court that their obligations should be excused or severely diminished.

Despite this optimistic forecast, State and local IV-D agencies, the courts, and IV-D attorneys must increase their commitment to effective interstate case processing. Until each link in the chain accepts full responsibility to carry out faithfully the functions delegated to it by statute or cooperative agreement, the interstate problem will plague the IV-D Program. IV-D attorneys can do their part by adopting a constructive, professional attitude regarding the interstate cases on which they work, and by attempting to transfer this attitude to other Program personnel. Federal law and professional ethics demand nothing less.

To promote uniformity and timely processing of interstate actions, an advisory committee consisting of key organizations in the legal and child support enforcement communities was convened in the winter of 1985 to develop a set of standardized action request forms. This set of forms would accompany essential case information and necessary attachments for States' use in transmitting requests for establishment and enforcement. (See Exhibits 9.1 and 9.2.) The forms are designed to:

- Simplify recordkeeping for courts and child support enforcement agencies
- Serve as a useful means for transmitting URESA actions with required attachments, and furnishing necessary identifying information to facilitate successful enforcement across State lines
- Expedite the processing of URESA cases
- Increase efficiency in securing collections
- Enhance communication between the initiating and responding States
- Reduce administrative costs
- Improve the attitudes of judges, attorneys, and child support enforcement workers.

These forms are currently available from the National Center for State Courts, Williamsburg, VA.

The remainder of this chapter discusses the major interstate procedures and remedies including: interstate wage withholding; proceedings to establish and enforce support obligations under Part III of URESA; registration under Part IV of URESA and other statutory provisions; comity and full faith and credit; actions in Federal court pursuant to 42 USC 660; requests for enforcement pursuant to 42 USC 654; and seizure of in-State wages and bank accounts of obligors who reside out of State or out of the country.

INTERSTATE WAGE WITHHOLDING

One of the most significant provisions of the Child Support Enforcement Amendments of 1984 is the interstate income withholding requirement. This section discusses both the statutory requirements and efforts by Program leaders to ensure that the procedure is implemented in a consistent and efficient manner.

Federal Requirements

As discussed in Chapter 6, the Child Support Enforcement Amendments of 1984 require each State to establish a system under which support payments will be withheld from the wages or other income on noncomplying obligors. [42 USC 666(b)(1).] The Federal statute further requires each State to extend its wage withholding system to "income derived within such State in cases where the applicable support orders were issued in other States, in order to assure that child support owed by absent parents in such State or any other State will be collected without regard to the residence of the child for whom the support is payable or of such child's custodial parent." [42 USC 666(b)(9).]

While the statute is very specific regarding the procedures that must be followed in wholly intrastate situations, it provides little guidance as to interstate procedures. 45 CFR 303.100(g) sets forth a general procedure for initiating wage withholding.

To initiate withholding, the IV-D agency in the State where the custodial parent applied must inform the IV-D agency in the State where the absent parent is employed of all information necessary to carry out the withholding. The employing State must provide advance notice of the proposed withholding, opportunity to contest the withholding, and notice to the employer. The law and procedures of the State of employment are to apply except with respect to when withholding must be implemented.[9]

The Child Support Project of the ABA's National Legal Resources Center for Child Advocacy and Protection, in conjunction with OCSE and the National Conference of State Legislatures, has drafted a Model Interstate Income Withholding Act,[10] which many States may wish to adapt in implementing the interstate wage withholding requirement.

The Social Security Act requires each State to appoint an agency to administer the wage withholding procedure. The Comments to the Model Interstate Income Withholding Act refer to these agencies as income withholding agencies of the requesting and the forum States. The former is the State in which the children reside; the latter the State in which the obligor resides or works.[11] This discussion is adapted from those Comments and uses the same terminology. The term agency refers most often to the IV-D agency or the courts, depending on which entity administers the procedure.

Responsibilities of the Requesting State Agency

The Model Act requires the income withholding agency to request interstate withholding on behalf of its current IV-D clients, as well as for State residents who apply for this service through the IV-D agency. This corresponds to the Federal requirement for intrastate cases, which requires that income withholding services be made available to IV-D agency clients, both AFDC and non-AFDC. [Social Security Act sec. 466(b)(2), 42 USC sec. 666(b)(2).] Non-AFDC families specifically may apply to the IV-D agency to take advantage of the withholding remedy, although many States allow non-AFDC families to institute this remedy through a private right of action as well. [See, for example, Cal.Civ.Code Ann. sec. 4701(b)(1); Tex.Fam.Code Ann. sec. 14.091.] In addition, the agency can be asked to initiate income withholding for a nonresident if the underlying support order was issued by that agency's State. Such a request is likely to occur when the obligee has moved out of State and all the relevant documents, including payment records, are still in possession of the enacting State or when the obligee moved out of State and was receiving payments directly from the obligor without ever using the agency services of a new State. In any event, the obligee also could elect to go to the agency where she or he now resides for purposes of initiating an interstate request for income withholding.

The procedure requires the requesting agency to compile and transmit all documentation required by the forum State, along with any subsequent modifications of the support order. If the requesting agency learns that a hearing has been scheduled or held in the forum jurisdiction, it must notify the obligee of the date, time, and place of the hearing and of his or her right to attend the hearing.

Entry of Order in Forum State

Upon receiving the request for income withholding and the accompanying documentation, the forum State's income withholding agency will enter the support order. Entering may be accomplished by filing the document with the appropriate court or agency. Entry of a sister State support order under the Act is the cornerstone of the interstate withholding procedure. Once the order is entered, it is enforceable by the forum State's own income withholding law with some specific minor modifications to accommodate interstate needs.

A support order entered in the agency or court essentially becomes an order of the forum State for the sole and limited purpose of obtaining income withholding. The Model Act makes it clear that the entered order does not confer jurisdiction on the court or agency for any other purpose, such as resolution of disputes over custody or visitation or modification of the original support order, whether prospectively or retroactively. (See discussion of modification below.)

Notice to the Obligor

On the day the out-of-State support order is entered under this procedure, notice of the proposed withholding must be sent to the obligor. The forum State will use its regular notice procedures to notify the obligor of its intent to withhold his or her income. Specifying when advance notice should be sent to the obligor is significant. Under the new Federal law, if the obligor contests the withholding, the State must determine within 45 days of such notice whether the withholding is appropriate. [42 USC 666(b)(4)(A).]

The notice should be served according to usual State practice and contain the same information required in an intrastate income withholding notice. According to section 466(b)(4)(A) of the Social Security Act, as amended by the Child Support Enforcement Amendments of 1984, the notice must alert the absent parent to the proposed withholding and to the procedures to follow to contest the withholding. The notice should state a method and a time period within which the parent must contact the court or agency in order to contest withholding, and should state that failure to do so will result in the implementation of withholding. The only added requirement of the Act is that the notice indicate that the proposed withholding is based upon a out-of-State support order.

The Child Support Enforcement Amendments of 1984 provides an exception for those States which were operating an income withholding system prior to the date of enactment of the 1984 Amendments. These States need not meet the advance notice requirements of the Amendments so long as their existing procedures meet due process requirements. [Social Security Act sec. 466(b)(4)(B), 42 USC 666(b)(4)(B).]

Documentation

The following documentation is required for the entry of a support order of another jurisdiction:

- A copy of the support order with all modifications (the ABA Model Law calls for a certified copy)
- A certified copy of an income withholding order or notice, if any, still in effect (the ABA Model Law calls for a certified copy)
- A copy of the portion of the rendering State's income withholding statute that sets forth the requirements for obtaining income withholding under the law of that State
- A sworn statement of the obligee or certified statement of the agency of the arrearages and the assignment of support rights, if any

- A statement of:
    - The name, address, and Social Security number of the obligor, if known
    - The name and address of the obligor's employer or of any other source of income of the obligor derived in the forum State against which income withholding is sought
    - The name and address of the agency or person to whom support payments collected by income withholding shall be transmitted.

The Model Act requires the forum State agency to take steps to correct faulty or incomplete documentation without returning it to the requesting agency, when possible. This should limit unnecessary delays and advance Congress' intent that income withholding be effected expeditiously. In addition to providing for correction of errors, this subsection requires the agency and court to accept or process documents which are correct in substance but not form.

The Hearing

If the absent parent requests a hearing, the forum State agency must notify the requesting agency. The Model Act provides a limited form of hearing. The entered support order, the existing income withholding order, if any, and the sworn or certified statement may be admitted into evidence, without any further proof or foundation required, and constitute prima facie proof that, without a valid defense, the obligee is entitled to income withholding under the law of the jurisdiction which issued the support order. This means that the amounts of current support and arrearages are as stated and that the triggering event (i.e., amount of arrears required to commence withholding) of the jurisdiction that rendered the support order has occurred.

Once a prima facie case is established, the Model Act shifts the burden of proof to the obligor. The obligor's defenses are limited to those permitted by the Child Support Enforcement Amendments of 1984. According to the 1984 Amendments legislative history, these defenses are restricted to "mistakes of fact," which include "errors in the amount of current support owed, errors in the amount of arrearage that had accrued, or mistaken identity of the alleged obligor." The obligor cannot "contest the proposed withholding on other grounds, such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation." [H.R. Rep. No. 98-527, 98th Cong., 1st Sess. 33 (1983).] Such claims, though important, must be pursued through a separate legal action in the State that has jurisdiction over the original support action.

In addition to mistakes of fact, three other defenses are permitted. These include two collateral attacks on the original judgment which even could be raised in the State which issued the original order if that State sought to enforce it. These attacks include charges that the court which issued the original support order lacked jurisdiction (if this had not been litigated previously), or that there was fraud in the procurement of the judgment. [See Griffin v. Griffin, 327 US 220 (1945); Scoles and Hay, Conflicts of Law, sec. 24.14 (1982); Leflar, American Conflicts of Law, 157 (1977); Restatement (Second), Conflicts of Law, sec.105 (1971).] Fraud in the procurement of the support order refers to fraud in the actual obtaining of the order (e.g., the defendant was lured into the jurisdiction in order to obtain personal jurisdiction). The third defense concerns the statute of limitations. [See Chapter 7 for a discussion of statutes of limitations as applied to child support orders.]

Choice of Law

In keeping with a major principle of the Model Act--that the forum State's regular income withholding laws and procedures be applied to the greatest extent possible--most choice of law questions are resolved in favor of the local law of the forum State, making it simpler for decisionmakers and employers to administer the procedure.

Only three issues are determined by the law of the State that issued the order. The first issue concerns questions about the interpretation of the original support order, including questions about the amount and form of payments and the duration of the order. For example, the law of the State issuing the order would determine the meaning of the term "minor child" as used in an order, whether support may continue beyond the age of majority for a college student, or whether in-kind payments would be credited against the support obligations. The law of the State that issued the original order also determines the amount of support arrearages necessary to require the commencement of withholding. This should pose no problem as no request should be made until this condition is met and the request should include a copy of the section of the State's withholding law containing this condition. Third, the law of the State issuing the support order determines what items are included as arrearages that may be enforced by income withholding. These could include interest on late payments, attorneys' fees, or cost of paternity determination.

Another potential conflict of law concerns statute of limitations provisions. Usually, in interstate cases, there will be no real conflict. If a judgment is rendered in the forum State, the statute of limitations for that State obviously will not have tolled and enforcement can continue in that State. If the statute of limitations has tolled in the initiating State, no judgment can be rendered there for forwarding to another State and there is nothing for the forum State to enforce. A judgment rendered in the initiating State that would have been barred by the statute of limitations in the forum State nonetheless must be enforced in the forum State. [Restatement (Second) Conflicts of Law, sec. 118(1) (1971).]

This rule should not be difficult for local judges and hearing officers. Under general conflicts of law principles, a judge may assume that the law of the State whose support order is being considered is the same as the law of the forum State until one of the parties demonstrates otherwise. Obviously, when a question is raised, it would be in the interest of the requesting State to submit an appropriate reference to the case and statutory law of the State that issued the order.

Discovery

If the obligor successfully meets the burden of establishing a defense, the Model Act provides that the court shall continue the case to allow the obligee to collect evidence. It provides further that if the obligor acknowledges some liability (current support, for example), the court shall require income withholding for that amount while the dispute as to other issues is resolved. The Act specifically allows use of depositions, written discovery, photographic discovery such as videotape depositions, as well as live testimony in person and on the telephone. The Act includes a procedure for taking depositions in the requesting State, similar to the procedure in URESA.

The Withholding Order and Notice

If the obligor does not request a hearing, or if a hearing is held and the court or agency determines that withholding is proper, it issues an income withholding order or notice to the absent parent's employer or other payor. The same procedure applies for both intrastate and interstate cases. [See Chapter 6.]

Entry of a support order or notice for withholding purposes does not nullify any other support order which may exist--whether issued by the forum State or another State. When two or more orders exist for the support of one child by an absent parent, any amount collected will be credited against both orders. Such a situation may exist, for example, if there is both an original support order and a subsequent URESA order. Amounts withheld are to be credited against both orders.

Payment Transmission

Income withheld in interstate cases is to be paid to the income withholding agency of the forum State, which in turn will forward it to the requesting agency or person. If the forum State uses a different entity such as a private agency or bank to collect and disburse support payments, as allowed under 42 USC 666(b)(5), this entity also should collect and disburse funds withheld in interstate cases under the Model Act.

Modifications

If the rendering State modifies a support order entered in the forum State, the forum State must take the necessary steps to modify the amounts withheld accordingly. Conversely, the agency in the forum State must notify the requesting agency when the obligor's source of income has shifted to yet another State. When there has merely been a shift of a source of income within the forum State (e.g., if the obligor gets a new job), the State agency will take necessary steps to obtain withholding against the new source of income, as it would with any other in-State income withholding case. [45 CFR 303.100(d)(3).] Some States have facilitated the task of identifying new income by requiring employers to notify the agency of any change in the obligor/employee's status, including the name and address of a new employer, if known. [N.D. Cent. Code secs. 14-09-09.1(6).] 45 CFR 303.100(d)(x) requires that States impose an obligation on the employer to provide this information to the State.

PART III URESA PROCEEDINGS

Unfortunately, income withholding will not be possible in all interstate cases. In many cases, an enforceable support order will not exist. In others, the absent parent will not have identifiable income to withhold. These instances necessitate proceedings under URESA unless the would-be responding State has an administrative process. Where administrative remedies exist, they must be exhausted before judicial remedies can be sought. This section discusses URESA proceedings in which the court in the responding State is asked to make an independent determination of the absent parent's support obligation. This type of proceeding is referred to as a Part III URESA action to differentiate it from proceedings under the URESA registration provisions. Registration, which is provided for in Part IV of URESA, is discussed separately.

Parties

Any person to whom a duty of support runs may initiate an action in the court having jurisdiction to handle URESA actions, asking the court to enforce that duty. A petition on behalf of a minor may be brought by any person having legal custody.[12] In some States, mere physical custody will suffice. [See Cobbe v. Cobbe, 163 A2d 333 (D.C.Mun.App. 1960); Clearwater County, Minn. v. Petrash, 198 Colo. 231, 598 P2d 138 (1979).]

If the State is furnishing financial assistance to the plaintiff, the State "has the same right to initiate a proceeding under this Act as the individual obligee for the purpose of securing reimbursement for support furnished and of containing continuing support."[13] This section has been held to support an action for reimbursement of AFDC paid to an obligor's dependents during periods in which no court order for current support existed. [State v. Erbin, 463 A2d 194 (R.I. 1983); Kinney v. Kinney, 453 A2d 1321, 122 N.H. 1165 (1982).] This is true even where the parents are divorced but where the divorce court did not enter an order for support. [State ex rel. State of California ex rel. Santa Barbara County v. Lagoy, 54 Or.App. 164, 634 P2d 289 (1979).] Conversely, if the divorce court entered an order specifically stating that the absent parent shall not be required to pay child support, the URESA court may be unable to order the absent parent to reimburse the State because no duty of support existed during the period AFDC was paid to the family. [Chance v. LaPausky, 43 Md.App. 84, 402 A2d 1329 (1979).] The obligee need not be joined as a party to such an action. [Rolette v. Rolette, 221 NW2d 645 (N.D. 1974).]

If the obligee is financially able, he or she may employ private counsel to initiate a URESA action. If not, he or she may apply for IV-D services. The IV-D agency will refer the matter to the relevant local official, usually the prosecuting attorney, who is required by the Act to file the action on behalf of the dependents.[14]

The Petition

The URESA statute sets forth minimum information requirements to be included in the petition, as follows:

- Names of the parties
- Address and, as far as known to the obligee, the circumstances of the obligor
- Names, addresses, and circumstances of the children for whom support is sought
- All other pertinent information.[15]

The statute further invites the petition drafter to include a description and photograph of the respondent to assist the responding State in identifying and locating him. Most State's URESA statutes require the petition to be verified or authenticated.[16] [See Exhibit 9.5 for a sample URESA petition.]

The petitioner may not be charged a filing fee or any other costs. The initiating or responding State may seek to recover its costs from the absent parent by making a prayer in the responding court.[17]

Initiating Court's Role

The role of the initiating court is limited. The court makes a finding based on the petition and, in some jurisdictions, after an ex parte hearing at which the obligee testifies. The finding consists of two components: (1) that it appears the obligor owes a duty of support to the plaintiff(s) and (2) that it appears the court in the responding State has jurisdiction over the obligor or his property.[18] This review is not a complicated process. It resembles a determination of whether a complaint in an ordinary civil case states a claim on which relief may be granted or a determination of probable cause in a criminal case. [Watson v. Dreading, 309 A2d 493 (D.C.App. 1973); Kirby v. Kirby, 338 Mass. 263, 155 NE2d 165 (1959); Saunders v. Saunders, 650 SW2d 534 (Tex.Civ.App. 1983).] The review as to jurisdiction is similarly brief. The court normally determines only that the obligor is likely to be physically present in the responding State. If the obligor contests the sufficiency of the petition, the law of the responding jurisdiction determines the issue. [Thibadeau v. Thibadeau, 133 Ga.App. 154, 210 SE2d 340 (1974).]

These two findings are entered of record in the Judge's Certification. [See Exhibit 9.4.] The certificate may contain a request that the responding State arrest the obligor, if arrest is permissible under State law and the court is persuaded that he or she might flee in response to being served with the URESA process.[19] The certificate often contains an order directing the court clerk to forward the pleadings and certificate to the responding jurisdiction.

Initiating courts customarily enter a recommendation as to the amount of support the responding court should order the absent parent to pay. The recommendation does not constitute a support order; in addition, URESA provides for no such recommendation. [Mossburg v. Coffman, 6 Kan.App.2d 428, 629 P2d 745 (1981).] Nor does the recommendation bind the responding court's adjudication of the merits of the case, although it may constitute prima facie evidence of the children's present needs and circumstances. [Gambino v. Gambino, 396 So2d 434 (La.App. 1981); State of Minn., Clay County, on behalf of Licha v. Doty, 326 NW2d 74 (N.D. 1982).]

Forwarding Documents to the Responding Jurisdiction

The court clerk forwards three copies of the petition, with attachments, and one copy of the initiating State's URESA statute to the responding State.[20] One copy is for the responding court, one for the prosecuting attorney in the responding jurisdiction, and one for service on the absent parent. Since the initiating court needs a copy for its file and the plaintiff(s) need copies, up to six copies may be required. [See Exhibits 9.3-9.6.]

If the clerk of the initiating court does not know the identity and address of the responding court, he or she may send the documents to the State information agency in the responding State, which will forward them to the proper court. Other duties of the State information agency include the following:

- Compile a list of the courts and their addresses in the State having jurisdiction under the Act and transmit it to the State information agency of every other State, and upon the adjournment of each session of the legislature, distribute copies of any amendments to the Act and a statement of their effective date to all other State information agencies.

- Maintain a register of lists of courts received from other States and transmit copies promptly to every court in the State having jurisdiction under the Act.

- Use all means at its disposal to discover the location of the obligor or his or her property or forward the case to the State parent location service.[21]

The National Child Support Enforcement Association has prepared a list of State information agencies.[22]

Filing the Action in the Responding Court

Upon receipt of the petition and attached documents, the clerk in the responding court is to "docket the case and notify the prosecuting attorney of his action." The prosecutor must "prosecute the case diligently."[23]

The prosecutor must first attempt to locate the absent parent "on his own initiative [using] all means at his disposal."[24] If the prosecutor has insufficient information and is unable to locate the defendant, the statute directs the prosecutor to inform the court "of what he has done and request the court to continue the case pending receipt of more accurate information or an amended [petition] from the initiating court."[25] Many prosecutors routinely return the documents to the initiating State instead of making use of available State and local locate resources. If all prosecutors would comply with the location requirement in the statute, and make full use of all locate resources provided by the State IV-D agency, the interstate process would be improved markedly.

If the respondent is located in another judicial district or in a different State, the responding court has the duty to forward the documents to the district or State, and then to notify the initiating State.[26] The court to which the documents are forwarded must treat the documents as though they were forwarded from the initiating State.

Once the case is filed, the clerk of the court will pass the documents on to the sheriff for service. Some States treat the URESA proceeding as a "show cause" situation. [See, for example, *State ex rel. Fulton v. Fulton*, 31 Or.App. 669, 571 P2d 179 (1977).] In these States, a show cause order must accompany the pleadings. Some courts include in the show cause order a provision requiring the obligor to bring to court evidence of his income (i.e., pay stubs, tax returns, cancelled checks).

In other States, the action begins with a normal civil summons, advising the absent parent that he or she has so many days to answer in order to avoid the entry of a default order based on the allegations contained in the pleadings. With either procedure it is a good idea for the prosecutor to cooperate with the court clerk in preparing the appropriate legal documents and in setting a date for hearing.

If the court believes that the obligor may flee the jurisdiction, it may "obtain the body of the obligor by appropriate process. Thereupon it may release him upon his own recognizance or upon his giving a bond in an amount set by the court to assure his or her appearance at the hearing."[27]

Jurisdiction

The test for *personal jurisdiction* is the same as for any *in personam* action brought in the responding State. (See discussions in Chapters 5 and 10, respectively.) The Uniform

Act refers in several sections to the court of the responding State obtaining jurisdiction "of the obligor or his property."[28] As noted in Chapter 6, the U.S. Supreme Court's decision in Shaffer v. Heitner, 97 SCt 2569, 53 LEd2d 683 (1977), probably would prohibit an action based solely on the obligor possessing property within the jurisdiction, unless the action were limited to enforcement of a pre-existing judgment for arrearages based on an out-of-State order.

With respect to subject matter jurisdiction, the statute and reported case law provide good direction. Section 32 of URESA provides that "participation in any proceeding under this Act does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding."[29] This provision generally has been construed to prohibit the responding court from considering:

- Counterclaims for divorce or property settlement [State ex rel. Schwartz v. Buder, 315 SW2d 867 (Mo.App. 1958); Mehrstein v. Mehrstein, 54 Cal.Rptr. 65, 245 Cal. App.2d 646 (1966); Blois v. Blois, 138 So2d 373 (Fla.App. 1962).]

- Counterclaims for custody and visitation. [England v. England, 337 NW2d 681 (Minn. 1983); State ex rel. Hubbard v. Hubbard, 110 Wis.2d 683, 329 NW2d 202 (1983); Pifer v. Pifer, 31 N.C.App. 486, 229 SE2d 700 (1976); Craft v. Hertz, 182 NW2d 293 (N.D. 1970); Grosse v. Grosse, 347 So2d 1099 (Fla.App. 1977); Hoover v. Hoover, 246 SE2d 179, 181 (S.C. 1978); Brown v. Turnbloom, 280 NW2d 473, 474 (Mich.App. 1979); Register v. Kandlbinder, 216 SE2d 647 (Ga.App. 1975).]

Responsive Pleadings

The Uniform Act does not provide specifically for a responsive pleading. Section 20 ("Hearing and Continuance") appears to assume that the obligor will enter a denial in person at the hearing, and substantiate his or her defense with evidence. At this point, the court is to determine, upon the request of either party, whether the matter should go to hearing immediately or whether a continuance should be granted.[30] This reading of Section 20 would turn the initial hearing into a kind of arraignment, at which the court would decide whether there exists probable cause to hold a hearing on any of the obligor's affirmative defenses.

Despite the lack of statutory guidance, many jurisdictions apply the normal rules of civil procedure and responsive pleadings are filed, at least where the obligor is represented by counsel. In a large percentage of cases, the obligor either fails to appear or appears and admits that a duty of support exists without filing an answer. In such cases, the prosecutor or other IV-D attorney should ask the obligor to produce evidence of his or her income and then apply the State's support guideline to determine an appropriate support amount.

The Hearing

Once the issues are enjoined, the case may proceed to hearing. The hearing should proceed like any other support proceeding, with the notable exception that the custodial parent is usually not available to testify. If the obligor asserts a defense, the prosecutor can have a difficult time proving the plaintiff's case, unless the hearing is treated as a show cause proceeding with the burden to proceed on the obligor.

In most jurisdictions, once the obligor asserts a defense, the two parties are on an equal footing. Because plaintiffs are asking the court to grant relief, they must proceed first and must substantiate the allegations contained in the petition with admissible and credible evidence. The allegations, standing alone or in combination with the written testimony attached to the petition, are not sufficient to authorize the court to enter an order over a proper objection. [*Freano v. Rosenbaum*, 399 So2d 758 (La.App. 1981); *Lambrou v. Berna*, 154 Me. 352, 148 A2d 697 (1959); *Pfueller v. Pfueller*, 37 N.J.Super. 106, 117 A2d 30 (1955); *O'Hara v. Floyd*, 47 Ala.App. 619, 259 So2d 673 (1972); *Ivey v. Ayers*, 301 SW2d 790 (Mo. 1957); *Kirby v. Kirby*, *supra*; but see *Saunders v. Saunders*, 650 SW2d 534 (Tex.Civ.App. 1983).]

Evidence

Clearly, as in other civil actions, the plaintiff bears the burden of proof. [*City and County of San Francisco v. Juergens*, 425 So2d 992 (La.App. 1983).] Section 20 allows the plaintiff's attorney to ask the court for a continuance during which to gather submissible evidence to prove the existence of a duty of support, to substantiate the needs of the children, and to counter any defenses interjected by the obligor at the hearing.[31] The case law provides some guidance regarding how this burden may be met. In *Ivey v. Ayers*, 301 SW2d 790, (Mo. 1957), the Missouri Supreme Court wrote:

> . . .plaintiff may use other means of establishing her case. She may call the defendant as a witness, and it may be that she can establish her case by his testimony. She can also appear in person and testify, but one of the purposes of the reciprocal features of the laws pertaining to the support of dependents is to avoid this necessity. She also has available to her the use of depositions the same as has the defendant, which would include the taking of her own testimony by deposition . . . apparently the deposition could be taken by the judge of the court in the initiating State. (Citations omitted.)

Section 23 of the 1968 Act states that the same rules of evidence apply as in other civil actions in the court.[32] Virtually all the evidence in URESA cases comes from the obligor and the obligee. Indeed, the plaintiff may prove his or her case entirely with the testimony of the obligor. [*Phillips v. Phillips*, 146 NE2d 919 (Mass. 1958).] Section 22 of the Act makes any law granting a privilege concerning communications between husband and wife inapplicable to URESA proceedings.[33] Both husband and wife are fully competent to testify as to any relevant matter between them. In order to ensure open communication in the family, the common law granted spouses a reciprocal privilege regarding communications that occur during the marriage. Neither could be forced to give testimony against the other, and the party against whom such testimony would be used had a right to object and bar its use. The common law rule has found its way into many State statutes that could be used to bar the plaintiff from proving important elements of his or her case (for example, the obligor's ability to earn based on statements he or she made to the obligee during prior periods). Section 22 prevents application of the privilege to URESA cases.

The secondary methods of producing evidence under the Act are interrogatories and depositions. Interrogatories have been approved for use in URESA cases. [*O'Hara v. Floyd*, 259 So2d 673 (Ala.App. 1972); *Tanya V. v. Rosa V.* 458 NYS2d 869, 117 Misc.2d 619 (1983).] As to depositions, most States have adopted a rule similar to Federal Rule of Civil Procedure 32(a)(3)(B) providing that the deposition of a witness or party may be introduced into evidence if the deponent is at least 100 miles away from the hearing or is out of the State. In most URESA cases, the petitioner falls into one of these categories. If not, the court may allow the deposition under a rule similar to Federal Rule 32(a)(3)(E), which allows the use of a deposition if it serves the interests of justice and outweighs the importance of presenting the testimony of a witness orally in open court. This broad language should cover most URESA cases, given the simplicity of issues involved and the clearly favorable policy of affording custodial parents an interstate remedy.

It has been recognized that a plaintiff in a URESA case can prove the case solely with a deposition. [O'Hara v. Floyd, supra; Altemus v. Altemus, 18 Md.App. 273, 306 A2d 581 (1973); Carpenter v. Carpenter, 231 La.638, 92 So2d 393, (1956).] Similarly, it has been held that obligor's sole right to confront plaintiff's witnesses is through depositions and written interrogatories. [Maza v. Iaia, 430 NYS2d 244, 105 Misc.2d 992 (1980).]

The court still has the discretion to refuse to admit the deposition if the distance the petitioner would have to travel is slight and it appears the petitioner is using URESA solely for the purpose of presenting the case by deposition in lieu of live testimony. The 1968 version of URESA specifically refers to using depositions.[34] The procedure for taking and using the deposition of the obligee generally follows Federal Rule 28. The deposition may be taken orally before an individual authorized to give oaths and act as a reporter in the obligee's State, or may be taken upon written questions. The obligor must be given notice in writing of the time and place of an oral deposition to allow for cross-examination. Thus, the "Testimony Form" (see Exhibit 9.6), though duly executed under oath perhaps in the presence of the initiating court, does not constitute a deposition. [Kirby v. Kirby, 338 Mass. 263, 155 NE2d 165 (1959).] If the correct procedure is followed and the obligor fails to take advantage of his or her opportunity to cross-examine, he or she has waived the right to confront the witness and cannot object at trial. [Daly v. Daly, 120 A2d 510, 39 N.J.Super. 117, aff'd. 123 A2d 3, 21 N.J. 599 (1956).]

The cross-examination may be conducted by the respondent's attorney, or through the submission of interrogatories. The 1968 Act recommends that the responding court appoint the judge of the initiating court as the official before whom the deposition is to be taken. The prosecutor in the initiating State would be available to conduct the examination and supervise transcription and transmittal of the deposition back to the responding court. Upon receipt of the transcript, the hearing can be rescheduled and resumed in the responding court. The costs of the deposition may be taxed as costs to the obligor. [O'Hara v. Floyd, supra.]

One crucial issue in any contested hearing may be the existence or nonexistence of a duty of support. Where an order exists in another State, a certified copy of the order is competent to establish that the obligor owes a duty to support the children named in the order. [State on behalf of McDonnell v. McCutcheon, 337 NW2d 645 (Minn. 1983); Mossburg v. Coffman, 6 Kan.App.2d 428, 629 P2d 745 (1981).] In States that have not enacted Section 23 of the 1968 Act, a similar procedure is available under the Federal Authentication Act, 28 USC 1738. Once the order is placed into evidence, the obligor may contest the existence of the duty of support only by attacking the validity of the order, and his or her defenses are limited to those available to a defendant in an action or proceeding to enforce a foreign money judgment.[35] One court has construed this provision to mean that once the order is received in evidence, the hearing becomes a show cause hearing to determine if there is any valid reason why the order should not be enforced as entered. [Bachmann v. Bachmann, 196 NW2d 80 (N.D. 1972).]

The other major issue at the hearing will be the obligor's ability to pay, as measured by his or her current income, or the income he or she could earn based on prior periods. This information can be obtained from the obligor through live testimony at the hearing, or in advance through discovery devices such as interrogatories and motions to produce documents. Subpoenas can be served on employers, banks, and acquaintances of the obligor. Clearly, the latter is the preferable method where time allows.

Paternity

The 1950 version of URESA, including the 1952 and 1958 amendments, did not specifically refer to paternity. As a result, a defense of nonpaternity caused the courts considerable difficulty. Although there is a small minority position [for example, Aguilar v. Holcomb, 155 Colo. 530, 395 P2d 998 (1964); and Smith v. Smith, 11 Ohio Misc. 25, 224 NE2d 925 (1965)], a majority of appellate courts have held that a court sitting in a URESA case has jurisdiction to determine paternity.

Perhaps the best discussion of this issue is to be found in the Supreme Court of Oregon's opinion in Clarkston v. Bridge, 539 P2d 1094 (Or.banc 1975). In Clarkston, a resident of Washington filed a petition under URESA alleging that a daughter had been born out of wedlock and that an Oregon resident was the father. The petition was forwarded to Oregon, and the alleged father denied paternity and challenged the court's jurisdiction to determine the issue. On appeal, the Oregon Supreme Court relied on Sections 2(b) and 2(f) of the Act, which provide as follows:

> If the court of the responding State finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order. (Emphasis added.)
>
> "Duty of support" includes any duty of support imposed or imposable by law, or by any court order, decree, or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, legal separation, separate maintenance, or otherwise. (Emphasis added.)

The court held that the above sections "authorize both the finding and the enforcement of duties of suppport which have not been previously established in another proceeding." [Clarkston, supra, p. 1096.] The court noted that a trial court sitting in a URESA proceeding necessarily first must decide whether the respondent is the child's father in determining whether such person owes a duty of support to a child born out of wedlock. Since the Oregon URESA authorizes the courts to find, as well as enforce, a duty of support, the court held the authority to establish paternity as clearly implied. [See also 81 ALR3d 1175, 1181 (1975); Moody v. Christiansen, 306 NW2d 775 (Iowa 1981); Sardonis v. Sardonis, 106 R.I. 469, 261 A2d 22 (1970); State of Iowa ex rel. Nauman v. Troutman, 623 SW2d 269 (Mo.App. 1981); Brown v. Thomas, 221 Tenn. 319, 426 SW2d 496 (1968); Yetter v. Commeau, 84 Wash.2d 155, 524 P2d 901 (1974); M. v. W., 352 Mass. 704, 227 NE2d 469 (1967); In re Miller, 114 NYS2d 304 (1952).]

In States that have adopted the 1968 revisions to the Act, it is clear that the court has jurisdiction to determine paternity, but it is also clear that the court has great discretion to refuse to exercise that jurisdiction:

> If the obligor asserts as a defense that he is not the father of the child for whom support is sought, and it appears to the court that the defense is not frivolous, and if both parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise, the court may adjourn the hearing until the paternity issue has been adjudicated.[36]

Once it is determined that the court possesses jurisdiction to determine paternity in the URESA proceeding, the next issue is to decide whether URESA or the procedure contained in the State's civil paternity statute applies. There is not ample case law from which to draw any solid conclusions, but it appears as though courts will graft the procedures and protections of the State's paternity statute onto the URESA statute. For instance, in Lee v. Lee, 442 NYS2d 904, 110 Misc.2d 623 (1981), a New York court held that blood tests could be ordered despite the lack of specific authority in the Act. Several courts have held that the alleged father is entitled to a jury trial on the issue of paternity, despite the lack of any such provision in the State's URESA statute. [Metts v. State Dept. of Public Welfare, 430 So2d 401 (Miss. 1983); Wahlers v. Frye, 205 Neb. 399, 288 NW2d 29 (1980); Clarkston v. Bridge, supra.]

Visitation and Custody

Section 23 of the 1968 Act states: "The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court."[37] This provision has been held to prevent the support obligor from defending the URESA action by complaining that the obligee is denying him or her court-ordered visitation. [Moffatt v. Moffatt, 165 Cal.Rptr. 877, 612 P2d 967 (1980).] The court in Moffatt reached its decision despite concluding that the obligee's denial of visitation was a flagrant violation of the divorce decree--one that would prevent her from seeking enforcement of the existing support order in the divorce action.

Many States have not enacted the 1968 amendments or have chosen not to incorporate Section 23. In these States, a public policy analysis must decide the issue. The purpose of URESA is to secure support for dependents from those who owe them this legal responsibility. Nowhere in the Act is the prosecutor charged with the duty of enforcing or defending visitation or custody claims. URESA is a special procedural statute designed to provide a convenient forum for the efficient resolution of support disputes. The only issue in most cases is the amount of support that should be paid. Nevertheless, visitation and custody issues have occasionally surfaced during the course of URESA cases.[38]

Many courts have denied the visitation/custody defense by holding that the obligee does not submit to the jurisdiction of the responding court for these issues, or that the court does not possess subject matter jurisdiction under the statute. [See Pifer v. Pifer; Graft v. Hertz; Grosse v. Grosse; Hoover v. Hoover, Brown v. Turnbloom, all supra.]

Other courts have refused to allow the defense by applying their own State law separating support from visitation/custody. [Com. v. Mexal, 201 Pa.Super. 457, 193 A2d 680 (1963); Carr v. Marshman, 195 Cal.Rptr. 603, 147 Cal.App.3d 1117 (1983); State ex rel. Hubbard v. Hubbard, 110 Wis.2d 683, 329 NW2d 202 (1983).]

On the other hand, State of New Jersey v. Morales, 35 Ohio App.2d 56, 299 NE2d 920 (1973), is frequently cited as authority for joining the issues of visitation or custody with the issue of support. The Ohio court held that the obligor legally could withhold support for the child because he had legal custody of the child. The obligor was prepared and willing to assume actual custody, and "it [was] not the father's desire that [the] children be public charges." [299 NE2d at 923.] The court noted that: "Where there is a judicial order relating to the custody of minor children, that order has the effect of law and is that which should determine the obligation of the respective parents to their minor children." [299 NE2d at 924; in accord are Hethcox v. Hethcox, 246 SE2d 444 (Ga. 1978); Campbell v. Campbell, 126 Ariz. 558, 617 P2d 66 (1980); State ex rel. Arnayo v. Guerrero, 517 P2d 526 (Ariz. 1973).] Two courts have held that legal custody in the absent parent does not prevent the responding court from finding the existence of a duty of support and entering an order. [State of Louisiana ex rel. Eaton v. Leis, 354 NW2d 209 (Wis. App. 1984); County of Clearwater Minn. v. Petrash, 198 Colo. 231, 598 P2d 138 (1979).]

Other courts have refused to consider custody and visitation defenses where the children are being supported by another State's IV-A agency, holding that the custodial parent's conduct should not be transferred to the welfare agency or that the custodial parent's destitution is a change of circumstances justifying a reappraisal of the support issue. [McCoy v. McCoy, 374 NE2d 164 (Ohio 1977); Bourdon v. Bourdon, 201 A2d 889 (N.H. 1964).]

A few States allow visitation and custody defenses in intrastate cases. As a result, an interstate case occasionally will involve a rendering State that recognizes the dependency between support and visitation or custody and a responding State that holds the issues to be separate. URESA provides that the law of the State where the obligor resided during the period for which support is sought controls regarding the existence of a duty of support.[39] Thus, normally the law of the responding State will control. However, if the obligor was present in the initiating State for a portion of the time, or if he or she returns to the initiating State and obtains a modification suspending his or her support obligation, the result changes. [See Shannon v. Sterling, 248 Minn. 266, 80 NW 13 (1956).]

Emancipation

Emancipation becomes a troublesome issue in interstate cases when a conflict exists similar to the one discussed in the previous paragraph. If the duty of support in the initiating or rendering State is different from that of the responding State, the responding State's law should apply during periods in which the obligor has resided in the responding State. [Federbush v. Mark Twain State Bank, 575 SW2d 829 (Mo.App. 1978); Burney v. Vance, 17 Ohio Misc. 307, 246 NE2d 371 (1969).]

Countermotions to Modify

On occasion, an obligor will file a countermotion to modify an existing support order of another State asking the responding court to grant retroactive or prospective relief. Such a tactic calls into play several complicated issues, ones with which appellate courts have not dealt in a clear manner.

The 1950 version of the Act, as amended, provided: "No order of support issued by a court of this State when acting as a responding State shall supersede any other order of support."[40] The 1968 version of the Act amended the provision to provide: "A support order made by a court of this State pursuant to this Act does not nullify and is not nullified by a support order made by a court of this State pursuant to a substantially similar act or otherwise or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court."[41] (Emphasis added.)

The underlined phrase of the revised Act appears to confer some jurisdiction on the responding court to "nullify" an existing order of another State. No reference to "modification" is made. The original language better states the philosophy behind the Act. The hearing in the responding jurisdiction is a de novo hearing. Most of the existing decisions have recognized this concept and have allowed the responding court to enter an order in a different amount, without affecting an existing order. [See Chisholm v. Chisholm, 197 Neb. 828, 251 NW2d 171 (1977); State on behalf of McDonnell v. McCutcheon, 337 NW2d 645 (Minn. 1983); Stubblefield v. Stubblefield, 272 SW2d 633 (Tex.Civ.App. 1954); DeFeo v. DeFeo, 428 A2d 26 (Del.Fam.Ct. 1981); Moore v. Moore, 252 Iowa 404, 107 NW2d 97 (1961); Sullivan v. Sullivan, 98 Ill.App.3d 928, 424 NE2d 957 (1981); Davidson v. Davidson, 66 Wash.2d 780, 405 P2d 261 (1965); Olson v. Olson, 534 SW2d 526 (Mo.App. 1976); State ex rel. Swan v. Shelton, 469 SW2d 943 (Mo.App. 1971).]

Many courts have confused the authority "to enter an order in a different amount" (having no effect on an existing order) with authority to enter a "modification" of that order. [See, for example, In re Marriage of Popenhager, 160 Cal.Rptr. 379, 99 Cal.App.3d 514 (1979); Byrd v. Bryd, 36 Conn.Sup. 601, 421 A2d 878 (1980); Campbell v. Jenne, 563 P2d 574 (Mont. 1977).] This construction destroys the efficacy of the Part III URESA procedure, which was designed to provide the support obligee an additional enforcement mechanism that does not require the children's rights in an existing decree to be risked in an ex parte proceeding without an opportunity to submit live testimony. Such a proceeding always has been available through statutory registration procedures and common law actions for debt based on an out-of-State judgment or order.

More importantly, the level of representation a prosecutor can provide an out-of-State custodial parent regarding issues not addressed in the petition and testimony form is generally inadequate. Due to heavy caseloads and lack of access to witnesses, the prosecutor should not be put in the position of defending these existing rights.

Jurisdiction in Another Court in the Responding State

Often the State in which the obligor now resides is the State where the duty of support arose. Another court in the State, or perhaps in the same judicial circuit, may have already exerted jurisdiction over the parties with respect to the same issues. In such a situation, the obligor may respond to the incoming URESA by filing a motion to dismiss, arguing that the original court retains exclusive continuing jurisdiction over the suppport issue.

This argument generally has failed by virtue of URESA's status as an "additional" or "cumulative" remedy. [RURESA, 9A U.L.A. sec. 3; Olson v. Olson, 534 SW2d 526 (Mo.App. 1976); People ex rel. Argo v. Henderson, 97 Ill.App.3d 425, 422 NE2d 1005 (1981).] This is true even if the responding court is the same court that entered the prior order. In that situation, the obligee has a choice. He or she can attempt to enforce or modify the existing order, or he or she can seek the entry of a new, independent order through URESA. [Ray v. Pentlicki, 375 So2d 875 (Fla.App. 1979); Paul v. Paul, 439 SW2d 746 (Mo. 1969).]

Constitutional Defenses

Several arguments have produced appellate decisions regarding the constitutionality of the URESA procedure. The following arguments have been made and rejected:

- That URESA constitutes an unlawful agreement or compact between States without the consent of Congress [Ivey v. Ayers, 301 SW2d 790 (Mo. 1957); Fraser v. Fraser, 415 A2d 1304 (R.I. 1980).]

- That the proceeding in the responding jurisdiction deprives the obligor the right of confronting his or her adverse witnesses as guaranteed by the Sixth Amendment to the U.S. Constitution [Gambino v. Gambino, 396 So2d 434 (La.App. 1981); Saunders v. Saunders, 650 SW2d 534 (Tex.Civ.App. 1983); Robinson v. Robinson, 8 Ohio App.2d 235, 221 NE2d 598 (1966); Com. ex rel. Shaffer v. Shaffer, 175 Pa.Super. 100, 103 A2d 430, 42 ALR2d 761.]

- That the independent determination of the support obligation in the responding jurisdiction in a straight URESA proceeding violates the full faith and credit requirement [Taylor v. Taylor, 175 Cal.Rptr. 716, 122 Cal.App.3d 209 (1981).]

- That the lack of notice given to the obligor regarding the time and place of the hearing in the initiating State violates his or her right to due process [Ivey v. Ayers, supra.]

- That by allowing a nonresident to maintain an action without subjecting him or herself to the jurisdiction of the responding court for other purposes, URESA violates the obligor's right under the 14th Amendment to equal protection of the laws and abridges his or her right to enjoy the same privileges or immunities as other citizens [Harmon v. Harmon, 160 Cal.App.2d 47, 324 P2d 901 (1958).]

- That the provisions of the Act defining duty of support are void due to vagueness [Harmon v. Harmon, supra.]

- That by allowing an obligee to bring suit for child support despite the existence of a divorce decree that does not provide for support, URESA is an ex post facto law and impairs the obligation of contracts in violation of Article I, Section 10 of the U.S. Constitution. [Smith v. Smith, 131 Cal.App.2d 764, 231 P2d 274 (1955).]

The Support Order

If the prosecutor submits competent evidence pertaining to each allegation contained in the petition and counters all defenses posited by the obligor, the court enters a support order at the end of the hearing. In most States, the order may include a determination of arrearages due and owing on an existing order (assuming the determination was prayed for) in addition to the new, independent order for current support. [In Interest of Solomon, 546 SW2d 129 (Tex.Civ.App. 1977); Mancini v. Mancini, 136 Vt. 231, 338 A2d 414 (1978); People ex rel. Oetjen v. Oetjen, 92 Ill.App.3d 699, 416 NE2d 278 (1981); Smith v. Smith, 3 Haw.App. 170, 647 P2d 722 (1982).] This is true even if the arrears do not possess the status of a judgment in the rendering State. [Bailey v. Haas, 655 P2d 764 (Alaska 1982).]

The court must require in the order that the obligor make the payments to the clerk of the responding court, or other agency authorized by the statute.[42] The court may require the obligor to put up a cash bond to secure payment of the order or subject the obligor to any other terms or conditions that are proper to secure compliance.[43] Either through this authority, or by specific authority contained in the State's wage withholding statute, the obligor should be subject to wage withholding to the same extent as is an obligor in an intrastate case.

Once the order is entered, the responding court must transmit a copy to the court in the initiating State.[44] When the obligor makes payments to the court clerk as per the order, the clerk must forward them to the designated official in the initiating State, who will distribute them to the obligee. The obligor receives credit for the payment on all existing support orders.[45]

Enforcement

If the obligor fails to comply with the order, the responding court may punish the obligor for contempt or enforce the order as it would enforce any other order of the court.[46] If the case is a IV-D case, it should be treated similarly to other IV-D cases. The responding IV-D agency should monitor the obligor's compliance and take enforcement action on its own volition. It should not be the sole responsibility of the initiating jurisdiction to monitor compliance; nor should the initiating jurisdiction be required to take formal action in order to seek enforcement.

Criminal Rendition

URESA also provides for the interstate criminal enforcement of support orders by facilitating the extradition of absent parents who have been charged with the crime of nonsupport in the requesting State. URESA calls for the Governor in the State where the absent parent is located to surrender the absent parent to the Governor of the State where the absent parent has been charged.[47] The rendition is accomplished by the State's usual extradition process, except that demand need not show:

- That the absent parent has fled from justice
- That the absent parent was in the demanding State at the time of the offense [Aikens v. Turner, 241 Ga. 401, 245 SE2d 660 (1978); In re Pace, 250 Ga. 276, 297 SE2d 255 (1982).]

The intent of these provisions is to ensure criminal responsibility where civil proceedings have failed. Therefore, the Governor may refuse to surrender the absent parent where:

- The absent parent has prevailed in a previous support action
- The absent parent currently is complying with an existing support order.[48]

Also, the Governor may delay the criminal rendition of the absent parent if he or she believes that a civil support action would be effective. In order to make these determinations, the Governor may order the prosecutor to investigate the case and report whether a support action has been brought previously or if such an action would be effective.[49]

Despite these limitations, it has been held that an extradition need not be refused if the obligee has alternative civil remedies. The criminal rendition procedure is an alternative choice the initiating jurisdiction is free to make. [Welch v. Strout, 180 NW2d 895 (Iowa 1971); Conrad v. McClearn, 166 Colo. 568, 445 P2d 222 (1968).] Likewise, it is no defense that the initiating jurisdiction previously sent a Part III URESA petition to the responding State and that a court in the responding State obtained jurisdiction over the obligor in a civil proceeding. [Ex Parte Brito, 172 Tex.Cr.R. 409, 358 SW2d 122 (1962).]

REGISTRATION

Full Faith and Credit

Under the common law, foreign judgments could only be enforced by new action in the second jurisdiction, where the original judgment was recognized as mere evidence of the debt.[50] The U.S. Constitution has attempted to change the common law rule by providing that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."[51]

The U.S. Supreme Court has held that only final orders are entitled to full faith and credit, and if the judgment is subject to modification in the State of rendition, it is not a final judgment.[52] Furthermore, the forum State may modify an order still subject to modification in the State that rendered it. As the Supreme Court stated in Halvey v. Halvey, "It is clear that the State of the forum has as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."[53] Therefore, a court may modify the child support order of a sister State being enforced in the forum State to the same extent it could be modified in the sister State.

To determine whether the order of a sister State is entitled to full faith and credit, the court must examine:

- The order to see if it reserves the right of modification
- The statutes and judicial decisions of the sister State to see under what circumstances the order may be modified.

Many States distinguish between arrearages and payments of future installments. Orders are generally subject to modification as to current support upon proof of change of circumstances.[54] (See Chapter 5, supra.) Orders are generally not retroactively modifiable in States where each accrued and past due payment automatically becomes a judgment. There is a presumption that an accrued payment is final, and unless the presumption is rebutted, the order is entitled to full faith and credit.[55] The obligor may rebut the presumption by showing that the State where the order was rendered requires arrearages to be reduced to a judgment for a sum certain and that a court in the rendering State may forgive all or part of the arrearage. In this case, the order would not be entitled to full faith and credit. However, the fact that the arrearages are not entitled to full faith and credit does not prevent the court from reducing the arrearages to judgment using the principle of "comity." (See discussion below.) The court can apply its own policy regarding the extent to which arrearages should be forgiven.

The Uniform Enforcement of Foreign Judgments Act

The Uniform Enforcement of Foreign Judgments Act, which has been adopted in 19 States, gives detailed procedures for seeking enforcement of a foreign judgment, as follows:

- The judgment creditor files an authenticated copy of the foreign judgment with the clerk of the court in the forum State.
- The clerk of the court sends notice of the filing to the judgment debtor.
- The judgment may be enforced as any other judgment of the forum State after a certain period of time has elapsed.
- The judgment debtor may receive a stay of execution of the foreign judgment if he or she can show that an appeal has been taken in the rendering State.[56]

With this procedure or some other procedure adopted by a particular State, valid judgments, including those for child support,[57] are entitled to full faith and credit unless:

- The judgment was rendered without jurisdiction.
- The judgment was rendered by a court lacking competence to render it.
- The judgment was not final under the law of the rendering State.
- The amount of the judgment has not been finally determined under the law of the rendering State.
- The judgment has been vacated in the State of rendition.
- The judgment is subject to modification in the State of rendition. (Again, the Constitution does not forbid the enforcement of such a judgment and a court is free to recognize or enforce a judgment that remains subject to modification.)[58]

Registration of Foreign Child Support Orders under URESA

Even though a support order is not entitled to full faith and credit, it still may be registered and enforced under Part IV of URESA.[59] Sections 35-41 of URESA, which were added to the Act with the 1958 Amendments, provide the following procedure for the registration of foreign support orders:

- The person wishing to register the order must send to the clerk of the court:
  - Three copies of the order to be registered
  - A copy of the URESA law of the State that rendered the order

  - A statement (or petition, in some States) verified and signed by the person, indicating the last known address of the absent parent, the amount unpaid, the description and location of the absent parent's property subject to execution, and a list of States in which the order is registered. [See Exhibits 9.7 and 9.8.]

- The clerk must then docket the case and notify the absent parent. [See Exhibit 9.9.]

- The absent parent has 20 days to petition the court to vacate the judgment or stay the enforcement of the judgment.

- If no such petition is filed or if the court refuses to grant relief, the court "confirms" the registration and the arrearages. [See Exhibit 9.10.]

- Upon registration, the order has the same effect as any other support order issued by the registering State.[60]

The registration procedure offers at least five advantages over other alternatives. First, the statute allows for registration of orders that are not entitled to full faith and credit. Thus, the registered order can be enforced for current and future support and for arrearages based on an order from a State that allows retroactive modifications. Second, registration is very fast. The order is registered and enforcement proceedings may begin upon filing in the obligor's State.[61] Third, the obligor's defenses are limited to those available to a judgment debtor in an action to enforce a foreign money judgment.[62] These generally relate only to the validity of the foreign judgment, such as lack of jurisdiction, unconstitutionality, or other procedural defect.[63] Fourth, registration is available to obtain jurisdiction over the obligor's property that is located in a State other than the State in which he or she resides for the limited purpose of enforcing a foreign support judgment. Personal jurisdiction over the obligor is not required for registration, which is a ministerial act of the court in no way affecting the obligor's liberty or property interests. [Fleming v. Fleming, 49 N.C.App. 345, 271 SE2d 584 (1980); Pinner v. Pinner, 33 N.C.App. 204, 234 SE2d 633 (1977).] When the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the obligor or his property and the amount of the arrearage. If the order was rendered in an automatic judgment State, and if authenticated court records from that State are available to substantiate the amount of the arrears, there should be no due process problems in seizing the obligor's property without jurisdiction over his person. [See Higgins v. Deinhard, 645 P2d 32 (Ariz.App. 1982); Lagerway v. Lagerway, 681 P2d 309, 312 (Alaska 1984).] Fifth, the obligor does not automatically obtain a redetermination of his support obligation, as is the case with straight URESA proceedings.

Balanced against these significant advantages are two significant disadvantages. First, the procedure is rarely used, and court personnel are often unaware of the procedure to register an out-of-State order properly. This problem can often be minimized by drafting a cover letter, politely and carefully explaining the procedure, with references to the statutes of the involved State.

The second problem is more significant and has led many attorneys in the Child Support Enforcement Program to forsake the use of the URESA registration procedure. By registering an out-of-State order, the obligee may become subject to the jurisdiction of the registering court for purposes of modification. Furthermore, a modification to the registered order also may effect a modification in the rendering State. [See Alig v. Alig, 255 SE2d 494 (Va. 1979); Monson v. Monson, 85 Wis.2d 794, 271 NW2d 137 (1978).] One Texas case has held the contrary, noting the URESA registration procedure would fail in its purpose if such a construction of the statute were allowed. [O'Halloran v. O'Halloran, 580 SW2d 870 (Tex.Civ.App. 1979).]

REQUESTS FOR ENFORCEMENT OF AN EXISTING ORDER

Sometimes an order already will exist in the jurisdiction where the absent parent resides. 42 USC 654(9)(c) requires each State to cooperate with any other State:

> . . .in securing compliance by an absent parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children. . .with respect to whom aid is being provided under the plan of such other State. . . .

Clearly, the State where the absent parent resides already has an obligation under the Federal statute to enforce an existing order. Some IV-D attorneys prefer to enforce the existing order instead of wasting both courts' time establishing a superfluous order through a URESA proceeding.

Other IV-D attorneys argue that a URESA proceeding is necessary in this situation for one of two reasons: (1) they do not possess standing or statutory authority to represent an out-of-State custodial parent in a non-URESA proceeding, and/or (2) they fear the non-URESA proceeding because they believe they are more in need of a live witness in such a proceeding than in a URESA case.

The first argument should not be true. The Federal statute clearly requires the State to enforce existing orders; this should confer standing in State court. It would be a bizarre state of affairs if a IV-D attorney were authorized to enforce an out-of-State order, but was powerless to enforce one issued by the local court. URESA is merely a procedural statute. The IV-D attorney should derive his or her authority through the statute or cooperative agreement that defines his or her relationship to the IV-D agency, not through URESA. The IV-D attorney, as legal representative of the IV-D agency, should have authority to bring any action the IV-D agency has standing to bring.

The second argument should not be true either, but for practical reasons often is. Except in States where the URESA proceeding is treated as a show cause hearing, there is nothing different about a URESA case as far as problems of proof are concerned. As noted above, the petition and testimony forms are not admissible as evidence. If the obligor contests his or her liability, the IV-D attorney has the same evidentiary problems he or she would face in enforcing an existing order.

In practice, this distinction between URESA and non-URESA cases often is not maintained, so there may be some actual strategic advantage to using the URESA procedure. The greater concern among IV-D attorneys is that a countermotion to modify is more likely in a non-URESA enforcement proceeding because the jurisdiction of the court is limited by the URESA statute. Although this should not be true, it often is. The court's jurisdiction over the cause of action that produced the original order most likely continues into the future, so the obligor's attorney would have little difficulty avoiding the limited jurisdiction of the URESA proceeding by simply filing the motion of modification in the other cause.

Nevertheless, many jurisdictions firmly hold that URESA is the only way to go in this situation. Other jurisdictions prefer a well-documented request for enforcement of the existing order over a superfluous URESA proceeding. The latter procedure should predominate after implementation of the interstate wage withholding procedure mandated by the Child Support Enforcement Amendments of 1984. The IV-D attorney who decides to avoid filing superfluous URESA proceedings should contact the would-be responding jurisdiction to determine its preference prior to filing the URESA action.

PETITION IN FEDERAL COURT

Pursuant to 42 USC 660, the U.S. District Courts of the United States have jurisdiction without regard to the amount in controversy to hear and determine any civil action certified by the DHHS Secretary. Certifications must be requested by a State IV-D agency and must include evidence of the following:

- The State in which the absent parent resides has not undertaken to enforce an existing order against the absent parent within 60 days of receipt of the request by the originating State under uniform reciprocal enforcement of support procedures or other legal processes required by 45 CFR 303.7(a)(3)
- Use of the U.S. District Court is the only reasonable method of enforcing the order.

As a condition to obtaining the certification from the DHHS, the IV-D agency of the initiating State must give the IV-D agency of the responding State no sooner than 60 days after first seeking assistance enforcing the order, a "30-day warning" of its intent to seek enforcement in Federal Court. If the initiating State receives no response within the 30-day time limit, or if the response is unsatisfactory, the initiating State may apply to its OCSE Regional Office for certification. The application must attest that the above requirements have been satisfied. Upon certification of the case, a civil action may be filed in the U.S. District Court. The certification should be accepted by the court as sufficient evidence that permission has been granted for use of the Federal courts. The action may be filed in the judicial district where the claim arose, where the plaintiff resides, or where the defendant resides.

OTHER ALTERNATIVES

In most cases it will be possible to effect enforcement by relying on interstate wage withholding, straight URESA actions, or some form of registration. Unfortunately, there will be a few cases that fall through the cracks due to lack of cooperation in the absent parent's jurisdiction, lack of good location information to allow for service of process, or similar problems. If an order exists, especially if the order exists in the State that wants enforcement, there are a few additional options. It may be possible to avoid the interstate process entirely by locating an asset of the obligor, such as wages, that can be reached within the State, and garnishing it. (See Chapter 6 for a discussion of garnishment of wages earned out of State but paid by a corporation that does business in the State.) It generally will be possible to refer the case for "full collection" by the IRS. If the crime exists in the State, the authority exists in the IV-D attorney, and the elements can be proved, it is possible to file felony nonsupport charges against the absent parent and get a warrant issued and placed in the interstate computer network maintained by law enforcement agencies. Alternatively, the case should be certified to the IRS for interception of the absent parent's tax refund.

INTERNATIONAL CASES (COMITY)

The problems faced by States when attempting to enforce an order when the parties reside in two different States are magnified where the parties reside in two different countries. Some States have been successful in obtaining mutual convenants with other countries, and can process cases through the URESA process.[64] Where no such arrangement exists, the process is difficult and must be negotiated on a case-by-case basis.

Outgoing Cases

When the absent parent leaves the United States, both location and enforcement can be difficult, but not impossible. If the absent parent is a United States citizen, the State Department can be a valuable ally in the location effort.[65] American embassies throughout the world, on request, will search their records and ask the host country to check its records for information on absent parents believed to be residing there. In addition, the U.S. Passport Services Office in Washington, DC, will cooperate by furnishing the addresses and possible destination listed on a passport application. Each such request must cite the U.S. statute under which the State or local IV-D agency operates (P.L. 93-647), the absent parent's name, date and place of birth, his or her parent's names, and his or her last known address with the date for which the address was valid. All requests should be in writing and should include all information the State Parent Locator Service has on the absent parent.

If the absent parent is not a U. S. citizen, the embassy or consulate maintained by his or her country's government in the United States is a valuable ally. Often it assists in locating the absent parent and identifies agencies in the relevant country that can assist in enforcement.[66]

Incoming Cases

Where an order has been issued by the other country and has been, or can be, translated so the State court is able to understand its terms, the doctrine of comity allows the State court to enforce it. To allow the court to invoke the doctrine in the case, a petition must be filed alleging the following five facts:

- The foreign order was based on grounds or elements that could reasonably lead a court in the forum State to find that a duty of support exists in the amount ordered.
- The foreign court had personal and subject matter jurisdiction requisite to enter the order.

- The obligor was provided with notice sufficient to comply with the foreign court's due process requirements.
- The foreign court acted in compliance with its own rules.
- The public policy of the forum State supports enforcement of the order.

Once the order is proved, it is entitled to a presumption of validity. [See Biewend v. Biewend, 17 Cal.2d 117, 109 P2d 701 (1941); anno., 132 ALR 1272; Venator v. Venator, 512 SW2d 451 (1974); Urbanek v. Urbanek, 503 SE2d 434 (1973).] The forum State's generally applicable enforcement remedies should be available to enforce the order.[66]

FOOTNOTES

/1/ Portions of this chapter are adapted from A Guide for Judges in Child Support Enforcement, by Chester A. Adams, et al. (Chevy Chase, MD: National Institute for Child Suppport Enforcement, 1982), pp. 77-93.

/2/ Early attempts at enforcement of the duty of support were through the criminal law only which made no reference to obligors who fled from the State.

/3/ Commentary, Uniform Reciprocal Enforcement of Support Act (URESA), 9A U.L.A., Matrimonial, Health, and Family Laws, 751.

/4/ URESA, 9A U.L.A. sec. 5.

/5/ URESA, 9A U.L.A. secs. 33-38.

/6/ Revised Uniform Reciprocal Enforcement of Support Act (RURESA), 9A U.L.A. sec 27.

/7/ Information concerning the variations in URESA laws of each State and territory can be found in the URESA Laws Digest published by OCSE in 1984 and revised by the National Institute for Child Support Enforcement in 1986 and in 9A U.L.A., Matrimonial, Family, and Health Laws, 943-827. In addition to information regarding statutory variations, U.L.A. tracks URESA case law from across the country in a section-by-section format.

/8/ For details, see Interstate Child Support Collections Study, A Study to Determine Methods, Cost Factors, Policy Options, and Incentives Essential to Improving Interstate Child Support Collections, Final Report, (Chevy Chase, Md: Center For Human Services, 1985), pp. 43-96.

/9/ 45 CFR 303.100(g).

/10/ Child Support Projects of the American Bar Association and National Conference of State Legislatures, Model Interstate Income Withholding Act with Comments (Washington, DC: U.S. Department of Health and Human Services, Office of Child Support Enforcement, 1985), pp. 3-1 through 3-25.

/11/ Id.

/12/ RURESA, 9A U.L.A. sec. 13.

/13/ RURESA, 9A U.L.A. sec. 8.

/14/ RURESA, 9A U.L.A. sec. 12.

/15/ RURESA, 9A U.L.A. sec. 11(a).

/16/ Id.

/17/ RURESA, 9A U.L.A. sec. 15.

/18/ RURESA, 9A U.L.A. sec. 14.

/19/ RURESA, 9A U.L.A. sec. 16.

/20/ RURESA, 9A U.L.A. sec. 14.

/21/ RURESA, 9A U.L.A. sec. 17.

/22/ National Roster and URESA/IV-D Referral (Des Moines, IA: National Child Support Enforcement Association (NCSEA), formerly The National Reciprocal and Family Support Enforcement Association, 1984). This publication is available through the NCSEA office, 503 East Fifteenth Street, Des Moines, IA 50316.

/23/ RURESA, 9A U.L.A. sec. 18.

/24/ RURESA, 9A U.L.A. sec. 19.

/25/ Id.

/26/ Id.

/27/ RURESA, 9A U.L.A. sec. 16.

/28/ RURESA, 9A U.L.A. secs. 14, 17(b).

/29/ RURESA, 9A U.L.A. sec. 32.

/30/ RURESA, 9A U.L.A. sec. 20.

/31/ Id.

/32/ RURESA, 9A U.L.A. sec. 23.

/33/ RURESA, 9A U.L.A. sec. 22.

/34/ RURESA, 9A U.L.A. sec. 20.

/35/ RURESA, 9A U.L.A. sec. 23.

/36/ RURESA, 9A U.L.A. sec. 27.

/37/ RURESA, 9A U.L.A. sec. 23.

/38/ This discussion of the visitation and custody interference defense is based on Robert Keith, J.D., "Support and Visitation: A Review of Recent Decisions," *Child Support Report*, 3(2): 4-6, 1981.

/39/ RURESA, 9A U.L.A. sec. 7.

/40/ RURESA, 9A U.L.A. sec. 30.

/41/ RURESA, 9A U.L.A. sec. 30.

/42/ RURESA, 9A U.L.A. sec. 28.

/43/ RURESA, 9A U.L.A. sec. 26.

/44/ RURESA, 9A U.L.A. sec. 25.

/45/ RURESA, 9A U.L.A. sec. 31.

/46/ RURESA, 9A U.L.A. sec. 26.

/47/ RURESA, 9A U.L.A. sec. 5.

/48/ RURESA, 9A U.L.A. sec. 6.

/49/ *Id*.

/50/ 11 *Cal.West L.Rev*. 280, 285.

/51/ U.S. Const., Art. IV.

/52/ *Lynde v. Lynde*, 181 U.S. 183 (1901).

/53/ 330 US 610 (1946).

/54/ *Sistare v. Sistare*, 218 US 1 (1910).

/55/ 11 *Cal.West L.Rev.* 280, 286.

/56/ Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. secs. 173-188.

/57/ 36 *Alabama Lawyer* 556, 561 (1975).

/58/ Rest. of the Law 2d, *Conflicts of Law*, secs. 103-116 (1971).

/59/ RURESA, 9A U.L.A. secs. 35-40.

/60/ W. Brockelbank and F. Infausto, Interstate Enforcement of Family Support, pp. 77-87 (2d ed. 1971).

/61/ RURESA, 9A U.L.A. sec. 40(a).

/62/ RURESA, 9A U.L.A. sec. 40(c).

/63/ Sabrina D. v. Thomas W., 443 NYS2d 111, 110 Misc. 2d 796 (1981); Ackerman v. Yanoscik, 601 SW2d 72 (Tex.Civ.App. 1980).

/64/ For a description of this process, see G. DeHart, "Child Support Enforcement," 2 Fam.Advoc. 26 (Fall, 1979).

/65/ This discussion is based on F. Graves, ed., "State Department Helps Locate Absent Parents," Child Support Report 7(4): 3, 1985.

/66/ For more information about the legal aspects of international enforcement proceedings, see J. Cavers, "International Enforcement of Family Support," 81 Colum.L.Rev. 994 (1981).

Exhibit 9.1

URESA ACTION REQUEST

TO: RESPONDING COURT OR AGENCY (ADDRESS)

FIPS CODE

FROM: INITIATING CONTACT PERSON (ADDRESS)

FIPS CODE

COLLECTION LOCATION (IF NEW OR DIFFERENT FROM ABOVE)

FIPS CODE

CASE TITLE

PLAINTIFF/PETITIONER

DEFENDANT/RESPONDENT

CASE STATUS

☐ **IV-D AFDC** ☐ **NON IV-D**

☐ **IV-D NON AFDC** ☐ **OTHER:**

INITIATING CASE OR DOCKET NO.	COUNTY
OTHER REFERENCE NUMBER	
RESPONDING CASE OR DOCKET NO.	COUNTY
OTHER REFERENCE NUMBER	

I. ACTION REQUESTED:

Please return the attached acknowledgment and take the action(s) requested:

☐ 1. ESTABLISH PATERNITY

☐ 2. ENTER ORDER FOR SUPPORT

☐ 3. ENFORCE ORDER FOR SUPPORT

☐ 4. COLLECT ARREARAGE — Welfare / Non Welfare

☐ 5. ENTER REIMBURSEMENT ORDER

☐ 6. REGISTER FOREIGN SUPPORT ORDER

☐ 7. CHANGE PAYEE [redacted]

☐ 8. OTHER: ____________ ⇨ SEE VI PAGE 2

SUMMARY OF LAST LEGAL PROCEEDING(S)

DATE AND COURT LOCATION

☐ NONE OR N/A
☐ DIVORCE
☐ PATERNITY
☐ SUPPORT
☐ SUPPORT MOD.
☐ CONTEMPT
☐ OTHER

2.	AMOUNT REQUESTED	PER (WEEK/MONTH)	☐ FAIR AND EQUITABLE
3.	AMOUNT ORDERED	PER	DATE OF SUPPORT ORDER
4. (Welfare)	ARREARAGE AMOUNT	AS OF (DATE)	FOR (TIME PERIOD)
4. (Non Welfare)	ARREARAGE AMOUNT	AS OF (DATE)	FOR (TIME PERIOD)
5.	AMOUNT NEEDED	TIME PERIOD OF EXPENSES	
6.	AMOUNT ORDERED	PER	DATE OF SUPPORT ORDER
7.	GRANT AMOUNT	DATE OF AWARD	
7.	REDIRECT PAYMENTS TO		

II. ABSENT PARENT INFORMATION

NAME AND ADDRESS (INCLUDE ALIAS)

SOCIAL SECURITY NUMBER	DATE OF BIRTH
HOME PHONE	WORK PHONE

EMPLOYER NAME AND ADDRESS

III. CUSTODIAN INFORMATION

NAME AND RELATIONSHIP (ADDRESS OPTIONAL IF INCLUDED IN ATTACHMENT)

SSN

PARENT IF DIFFERENT FROM ABOVE

SSN

IV. DEPENDENT CHILDREN

NAME (FIRST MI LAST)	DATE OF BIRTH			PAT. EST.?
	MO	DAY	YEAR	

CONTINUE ON PAGE 2 SEC VI FOR LISTING ADDITIONAL CHILDREN OR OTHER INFORMATION

FORM NO. CSP 1 (6/85)

URESA ACTION REQUEST
PAGE 1 OF 2 PAGES

URESA ACTION REQUEST **CONTINUATION**	INITIATING CASE NUMBER	RESPONDING CASE NUMBER

V OUTSTANDING PENDING ACTIONS

☐ ARREST WARRANT
☐ BENCH WARRANT
☐ CONTEMPT OF COURT
☐ PENDING DIVORCE
☐ PENDING SUPPORT MODIFICATION
☐ CERTIFICATION OF IRS OFFSET

☐ OTHER ______________________________

EXPLAIN THE PENDING ACTION CHECKED ABOVE.

VI. PROVIDE ANY OTHER INFORMATION THAT WILL SPEED UP OR CLARIFY THIS REQUEST:

☐ CONTINUE ON ATTACHED SHEET IF NECESSARY.

SEE INSTRUCTIONS BEFORE ASSEMBLING DOCUMENTATION AND LISTING ATTACHMENTS

VII. ATTACHMENTS: (SUPPORTING DOCUMENTATION)

☐ URESA PETITION (3 copies)
☐ CERTIFICATION OR ORDER (3 copies)
☐ INITIATING STATE URESA LAW (3 copies)
☐ PHYSICAL DESCRIPTION OF ABSENT PARENT
☐ PHOTOGRAPH OF ABSENT PARENT
☐ TESTIMONY
☐ PREVIOUS COURT ORDER
☐ INCOME AND EXPENSE STATEMENT
☐ ARREARAGE STATEMENT
☐ PAYMENT RECORD

☐ DOCUMENTS RELATING TO PATERNITY
☐ MARRIAGE CERTIFICATE
☐ DIVORCE DECREE
☐ ASSIGNMENT OF RIGHTS
☐ OTHER:

DATE	SIGNATURE OF INITIATING CONTACT PERSON	PHONE NUMBER

FORM NO. CSP1A (6/85)

URESA ACTION REQUEST - CONTINUATION
PAGE 2 OF 2 PAGES

URESA REQUEST ACKNOWLEDGMENT

FROM: RESPONDING COURT OR AGENCY (ADDRESS)	FIPS CODE	**CASE TITLE** PLAINTIFF/PETITIONER
		DEFENDANT/RESPONDENT
		CASE STATUS ☐ IV-D AFDC ☐ NON IV-D ☐ IV-D NON AFDC ☐ OTHER:
TO: INITIATING CONTACT PERSON (ADDRESS)	FIPS CODE	INITIATING CASE OR DOCKET NO. / COUNTY
		OTHER REFERENCE NUMBER
COLLECTION LOCATION (IF NEW OR DIFFERENT FROM ABOVE)	FIPS CODE	RESPONDING CASE OR DOCKET NO. / COUNTY
		OTHER REFERENCE NUMBER

FOLD HERE

VIII. RESPONSE: ENTER YOUR CASE OR DOCKET NUMBER ABOVE AND COMPLETE LOWER PORTION

☐ 1. At this time no additional information is needed to proceed with this request.

A HEARING IS SET FOR ______________________.

☐ 2. Our (responding jurisdiction) address correction is indicated in the box provided in #3.

☐ 3. The contact person (if different from above) for this matter will be:

NAME AND TITLE	CORRECT ADDRESS
PHONE NUMBER	

FOLD HERE

☐ 4. A better address for Defendant/Respondent is needed.

☐ 5. Additional information or supporting documents are needed as indicated below:

☐ 6. Our jurisdiction requires certified copies of the following documents:

THE ABOVE REQUESTED ADDITIONAL INFORMATION MUST BE RECEIVED PRIOR TO ______________________
BECAUSE OF THE FOLLOWING SCHEDULED HEARINGS:

DATE PREPARED

URESA ACTION REQUEST

INSTRUCTIONS TO INITIATING JURISDICTION

The URESA ACTION REQUEST form summarizes the important case information from the URESA action being transmitted and, therefore, is intended to take the place of a cover letter. IT DOES NOT TAKE THE PLACE OF AN ACCURATE AND COMPLETE PETITION. Before completing the form, review the allegations and the request for relief in the petition filed in this case. It is important that the action requested in Section I is the same as the requested relief in the petition.

INSTRUCTIONS FOR PAGE 1

Begin by filling in the upper, unnumbered portion of the form. Note that due to the inserted carbon, this information will transfer to the URESA REQUEST ACKNOWLEDGMENT form. The responding jurisdiction will send this form back to you, letting you know that they have received your request and are processing it as fast as possible. They will use this form to indicate if any additional information is needed.

In the block entitled "To: Responding Court or Agency," fill in the name and address of the court or agency that you are asking to process the URESA action. In the block entitled "From: Initiating Contact Person," fill in your name, agency, and address. For both blocks, enter the correct FIPS code designation. In the block entitled "Collection Location," fill in the name and address of the court or agency that should receive the support payments if different from that indicated in the block entitled "Initiating Contact Person."

Fill in the name or style of the case by indicating the plaintiff/petitioner and the defendant/respondent. Indicate what type of case this is by checking a box in the section entitled "Case Status." Use the "Other" box for cases that do not fall in these categories (for example, foster care or IV-E). Fill in the case or docket number that has been assigned to this case by your court or agency in the block entitled "Initiating Case or Docket Number." Enter the name of the county where this case was filed. You may want to fill in the block entitled "Other Reference Number" if your state assigns other identifying numbers.

I. ACTION REQUESTED

Check a box or boxes in order to indicate the action or actions that you want the responding jurisdiction to undertake, in order to fully process the case. For all action requests, complete the unnumbered section to the right entitled "Summary of Last Legal Proceeding." For actions 2 - 7, only complete those corresponding right-hand sections that relate to the action you are requesting. Use the action designated "8. Other," to request miscellaneous orders and judgments, such as Orders of Emancipation. Use the space provided on page 2, Section VI, to explain requests in this category.

II. ABSENT PARENT INFORMATION

Fill in the name, address, social security number, date of birth, phone numbers, and employer information for the absent (respondent) parent. Include any names that the absent parent has been known to use. ATTACH A PHOTOGRAPH OF THE ABSENT PARENT, IF AT ALL POSSIBLE.

III. CUSTODIAN INFORMATION

Fill in the name of the plaintiff/petitioner in this case and indicate the relationship to the dependents. Include his/her social security number. You may omit the address if it is available in the attached documents. If the custodian is not the parent, also fill in the name, address, and social security number of the parent (if known and available).

IV. DEPENDENT CHILDREN

Fill in the name(s) of the child or children involved in this case. Include their dates of birth. If there is not enough space, list the additional children and any other information in the space provided in Section VI on page 2 of the form. For each child, indicate whether or not paternity has been established, by filling in Yes or No in the "Pat. Est.?" column.

INSTRUCTIONS FOR PAGE 2

In the upper right hand corner, again, fill in the case or docket number(s) that have been assigned to this case by your court or agency.

V. OUTSTANDING PENDING ACTIONS

Check box(es) to indicate any outstanding or pending court or administrative actions that affect this request. Explain these matters briefly in the space provided.

VI. OTHER INFORMATION

If necessary, use this space to explain the action requested as designated in Section I, "8. Other" or to list additional dependent children from Section IV. This section also can be used for any information that will (in your judgment) help the responding jurisdiction understand or respond to this request faster.

VII. ATTACHMENTS

Inclusion of the proper documentation is critical and will enable the responding court or agency to take appropriate and timely action. The attachments will differ depending on the action requested and the individual circumstances. You are encouraged to consult the URESA Laws Digest (OCSE), the National Roster and URESA IV D Referral Guide (NCSEA), and the statutory annotations to URESA in 9A Uniform Laws Ann., Matrimonial, Family and Health Laws (West Pub. Co.) for information on the various requirements in different states.

Arrange the supporting documents in a logical or chronological order AND indicate what is being transmitted by checking the appropriate box or listing them in the space marked "Other." AVOID ATTACHING ENTIRE CASE FILES BUT INCLUDE ALL NEEDED DOCUMENTS. If it will be necessary to serve legal documents on the absent parent, ENCLOSE A RECENT PHOTOGRAPH.

All cases will require three copies each of the URESA petition, current support order, judge's certificate, and initiating state's URESA statute. Note that all previously entered legal documents must be certified as true copies.

The following checklist suggests other additional attachments for each of the actions requested in Section I:

1. ESTABLISH PATERNITY
   Testimony, application or affidavit, lab reports (serology), child's birth certificate, hospital documents, marriage or divorce certificates.
2. ENTER ORDER FOR SUPPORT
   Previous court order(s), affidavit of needs, income and expense statement.
3. ENFORCE ORDER FOR SUPPORT
   Previous court order(s), collection or payment record or certification, arrearage statement.
4. COLLECT ARREARAGE
   Court order(s), arrearage statement, payment record.
5. ENTER REIMBURSEMENT ORDER (also known as Reimbursement of Necessaries).
   Court order(s), statement of medical expenses or payments, affidavit stating the amount of AFDC grant for child and the amount for the caretaker.
6. REGISTER FOREIGN SUPPORT ORDER
   Statement of Facts, three certified copies of support order or modification.
7. CHANGE PAYEE
   Assignment of rights.
8. OTHER — attach whatever may be needed.

Complete the form by entering the date and signing your name. It also is important to include your telephone number in the space provided. Retain the third part of each page for your (initiator's) file.

URESA REQUEST ACKNOWLEDGMENT

INSTRUCTIONS TO RESPONDING JURISDICTION

Fill out the URESA REQUEST ACKNOWLEDGMENT portion of the form (page 1, part 2) as soon as the URESA ACTION REQUEST arrives at the court or agency that will actually process the case. Complete upper portion of form by filling in the case or docket number assigned to this case by your court or agency and the county. Include any other identifying number that your state has assigned to this case.

VIII. RESPONSE

Check block 1 if you have received all of the necessary documents and information. If possible, indicate the date on which the case has been set for hearing.

Check appropriate block(s) 2 - 6 to request any additional documents or information that are needed in order to take care of this request. For example, you may be having difficulty serving the defendant and thus require a more accurate address or photo.

Enter the date by which you need to receive the additional information. Explain why by providing the date of scheduled hearings.

Enter the date you prepared this form.

If necessary, photocopy this form and forward it to the appropriate central administrative agency in your state. Retain a copy for your file.

Fold the form as shown in the margin and mail to the initiating jurisdiction. It has been designed to fit into a standard #9 (3⅞" × 8⅞") window envelope.

Exhibit 9.2

INTERSTATE CHILD SUPPORT ENFORCEMENT TRANSMITTAL

RESPONDING AGENCY: COMPLETE AND RETURN PAGE 3 TO ACKNOWLEDGE RECEIPT OF THIS REQUEST. AFTER TAKING REQUESTED ACTION, COMPLETE AND RETURN PAGE 4 (RESPONSE FORM).

I. TO: RESPONDING IV-D AGENCY/OFFICE

FIPS CODE

CASE NAME (Last Name, First Name, Middle Initial)

FROM: INITIATING IV-D AGENCY/OFFICE

FIPS CODE

CASE NUMBER (Responding Agency)

CASE NUMBER (Initiating Agency)

COLLECTION LOCATION (Forward Payments to:)

FIPS CODE

CASE TYPE/STATUS

☐ IV-D NON-AFDC ☐ NON IV-D

☐ IV-D AFDC ☐ OTHER ____________

II. ACTION REQUESTED (TO BE COMPLETED BY INITIATING AGENCY)

☐ ENFORCE EXISTING SUPPORT ORDER
ATTACHMENTS: Support Order And Any Modifications

☐ LOCATE ABSENT PARENT
ATTACHMENTS:
Aliases, Physical Description, Photograph
Warrants, Background Information

☐ INITIATE WAGE WITHHOLDING
ATTACHMENTS:
Support Order, Certification of Arrears

☐ CONDUCT ADMINISTRATIVE REVIEW FOR FEDERAL TAX OFFSET (WITHIN 45 DAYS)
ATTACHMENTS:
Case Documentation/Summary Support Order and Modifications, Affidavit From Custodial Parent, AP Correspondence

☐ INITIATE STATE TAX INTERCEPT
ATTACHMENTS: Court or Administrative Order

☐ DOCUMENT INFORMATION (i.e., FEDERAL TAX OFFSET)

☐ VERIFY OR PROVIDE SOCIAL SECURITY NUMBER

☐ VERIFY AND PROVIDE COPY OF SUPPORT ORDER AND ANY MODIFICATIONS

☐ VERIFY ARREARS AND PROVIDE COPY OF CALCULATIONS

☐ OTHER: ____________________

____

III. ABSENT PARENT INFORMATION

FULL NAME (First Name, Middle Initial, Last Name)

ADDRESS (Street, City, State, Zip)

EMPLOYER (Name)

EMPLOYER ADDRESS (Street, City, State, Zip)

DATE OF BIRTH

SOCIAL SECURITY NO.

SEX ☐ MALE ☐ FEMALE

HOME PHONE (Include Area Code)

WORK PHONE (Include Area Code)

IV. DEPENDENT CHILDREN INFORMATION

NAME(S)	SEX (M,F)	DATE OF BIRTH

V. CUSTODIAL PARENT INFORMATION

FULL NAME (First Name, Middle Initial, Last Name)

SOCIAL SECURITY NO.

HOME PHONE (Include Area Code)

ADDRESS (Street, City, State, Zip)

WORK PHONE (Include Area Code)

VI. CASE SUMMARY (BACKGROUND OF THIS MATTER)

DATE OF SUPPORT ORDER

STATE & COUNTY ISSUING ORDER

COURT CASE NO.

DATE AND TYPE OF LAST COURT/ADMINISTRATIVE ACTION

SUPPORT AMOUNT/FREQUENCY $ ________ PER ________

DATE OF LAST PAYMENT (Month,Day,Yr.)

CURRENT AMOUNT OF ARREARS $ ____________

PERIOD OF COMPUTATION FROM ________ TO ________

VII. CONTACT PERSON (Initiating Agency)

DATE

PHONE NUMBER (Include Area Code)

RESPONDING AGENCY

PAGE 1 OF 4

INTERSTATE CHILD SUPPORT ENFORCEMENT TRANSMITTAL	**RESPONDING AGENCY:** COMPLETE AND RETURN PAGE 3 TO ACKNOWLEDGE RECEIPT OF THIS REQUEST. AFTER TAKING REQUESTED ACTION, COMPLETE AND RETURN PAGE 4 (RESPONSE FORM).
I. FROM: RESPONDING IV-D AGENCY/OFFICE FIPS CODE	CASE NAME (Last Name, First Name, Middle Initial)
TO: INITIATING IV-D AGENCY/OFFICE FIPS CODE	CASE NUMBER (Responding Agency) CASE NUMBER (Initiating Agency)
COLLECTION LOCATION (Forward Payments to:) FIPS CODE	CASE TYPE/STATUS ☐ IV-D NON-AFDC ☐ NON IV-D ☐ IV-D AFDC ☐ OTHER ______

II. ACTION REQUESTED (TO BE COMPLETED BY INITIATING AGENCY)

☐ ENFORCE EXISTING SUPPORT ORDER
ATTACHMENTS: Support Order And Any Modifications

☐ LOCATE ABSENT PARENT
ATTACHMENTS:
Aliases Physical Description, Photograph
Warrants, Background Information

☐ INITIATE WAGE WITHHOLDING
ATTACHMENTS:
Support Order, Certification of Arrears

☐ CONDUCT ADMINISTRATIVE REVIEW FOR FEDERAL TAX OFFSET (WITHIN 45 DAYS)
ATTACHMENTS:
Case Documentation/Summary Support Order and Modifications, Affidavit From Custodial Parent, AP Correspondence

☐ INITIATE STATE TAX INTERCEPT
ATTACHMENTS: Court or Administrative Order

☐ DOCUMENT INFORMATION (i.e., FEDERAL TAX OFFSET)

- ☐ VERIFY OR PROVIDE SOCIAL SECURITY NUMBER
- ☐ VERIFY AND PROVIDE COPY OF SUPPORT ORDER AND ANY MODIFICATIONS
- ☐ VERIFY ARREARS AND PROVIDE COPY OF CALCULATIONS

☐ OTHER: ____________________

____

III. TO BE COMPLETED BY RESPONDING AGENCY:

☐ REQUEST RECEIVED AND NO ADDITIONAL INFORMATION NECESSARY TO PROCEED

☐ REQUESTED ACTION TAKEN, INFORMATION PROVIDED BELOW (SEE REMARKS)

☐ CONCUR WITH INFORMATION AS PROVIDED

☐ DIFFERENCES OR CHANGES TO INFORMATION PROVIDED (SEE REMARKS)

☐ ADDITIONAL INFORMATION NEEDED TO PROCEED (SEE REMARKS)

☐ TAX OFFSET ADMINISTRATIVE REVIEW CONDUCTED (SEE REMARKS)

☐ OTHER ____________________

____

REMARKS:

IV. CONTACT PERSON (Responding Agency)	DATE	PHONE NUMBER (Include Area Code)

ACKNOWLEDGEMENT FORM **PAGE 3 OF 4**

INTERSTATE CHILD SUPPORT ENFORCEMENT TRANSMITTAL

THE PURPOSE OF THIS TRANSMITTAL FORM IS TO FACILITATE REFERRING CASES FOR INTERSTATE ENFORCEMENT ACTION. THIS IS A FOUR (4) PAGE CARBON FORM:

PAGE 1	– SENT TO "RESPONDING AGENCY"
PAGE 2	– RETAINED BY "INITIATING AGENCY"
PAGE 3	– USED BY "RESPONDING AGENCY" TO ACKNOWLEDGE RECEIPT (RETURNED TO "INITIATING AGENCY")
PAGE 4	– USED BY "RESPONDING AGENCY" WHEN ACTION IS COMPLETED (SENT TO "INITIATING AGENCY")

INSTRUCTIONS FOR COMPLETION

"INITIATING AGENCY"

SECTION I	– IDENTIFY ADDRESSES FOR AGENCIES AND COLLECTION LOCATION AND PROVIDE CASE IDENTIFYING INFORMATION
SECTION II	– CHECK BOX TO INDICATE THE TYPE OF ACTION REQUESTED
SECTION III THRU VI	– COMPLETE AVAILABLE CASE IDENTIFYING INFORMATION
SECTION VII	– PROVIDE NAME AND PHONE NUMBER OF CONTACT PERSON IN THE "INITIATING AGENCY"
PAGES 1,3,4	– **FORWARD ALONG WITH NECESSARY ATTACHMENTS TO THE "RESPONDING AGENCY"**
PAGE 2	– **RETAIN FOR "INITIATING AGENCY'S" RECORDS**

"RESPONDING AGENCY"

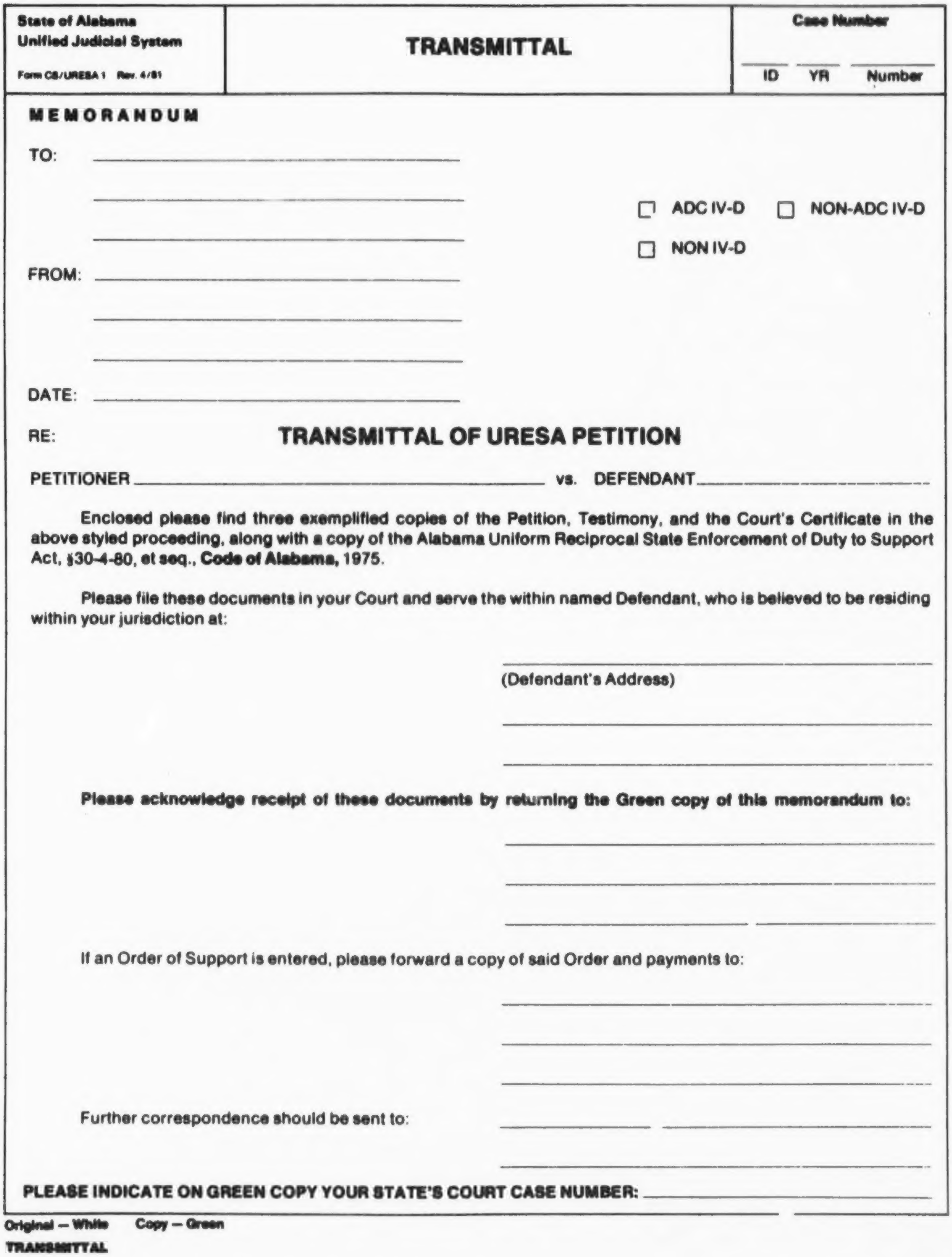
UPON RECEIPT OF REQUEST, COMPLETE PAGE 3

SECTION I	– CORRECT ADDRESS, IF NECESSARY, AND PROVIDE "RESPONDING AGENCY" CASE NUMBER
SECTION III	– CHECK APPROPRIATE BOX
SECTION IV	– PROVIDE NAME AND PHONE NUMBER OF CONTACT PERSON IN THE "RESPONDING AGENCY"
PAGE 3	– **RETURN TO "INITIATING AGENCY" (PHOTOCOPY FOR "RESPONDING AGENCY'S" RECORDS IF NECESSARY)**

AFTER COMPLETING REQUESTED ACTION, COMPLETE PAGE 4

SECTION III	– CHECK APPROPRIATE BOX
PAGE 4	– **RETURN TO "INITIATING AGENCY" (PHOTOCOPY FOR "RESPONDING AGENCY'S" RECORDS IF NECESSARY)**

Exhibit 9.3*



State of Alabama **Unified Judicial System** Form CS/URESA 1 Rev. 4/81	**TRANSMITTAL**	**Case Number** ID YR Number

MEMORANDUM

TO: ____________________

☐ ADC IV-D ☐ NON-ADC IV-D

☐ NON IV-D

FROM: ____________________

DATE: ____________________

RE: **TRANSMITTAL OF URESA PETITION**

PETITIONER ____________________ vs. DEFENDANT ____________________

Enclosed please find three exemplified copies of the Petition, Testimony, and the Court's Certificate in the above styled proceeding, along with a copy of the Alabama Uniform Reciprocal State Enforcement of Duty to Support Act, §30-4-80, et seq., **Code of Alabama,** 1975.

Please file these documents in your Court and serve the within named Defendant, who is believed to be residing within your jurisdiction at:

____
(Defendant's Address)

Please acknowledge receipt of these documents by returning the Green copy of this memorandum to:

If an Order of Support is entered, please forward a copy of said Order and payments to:

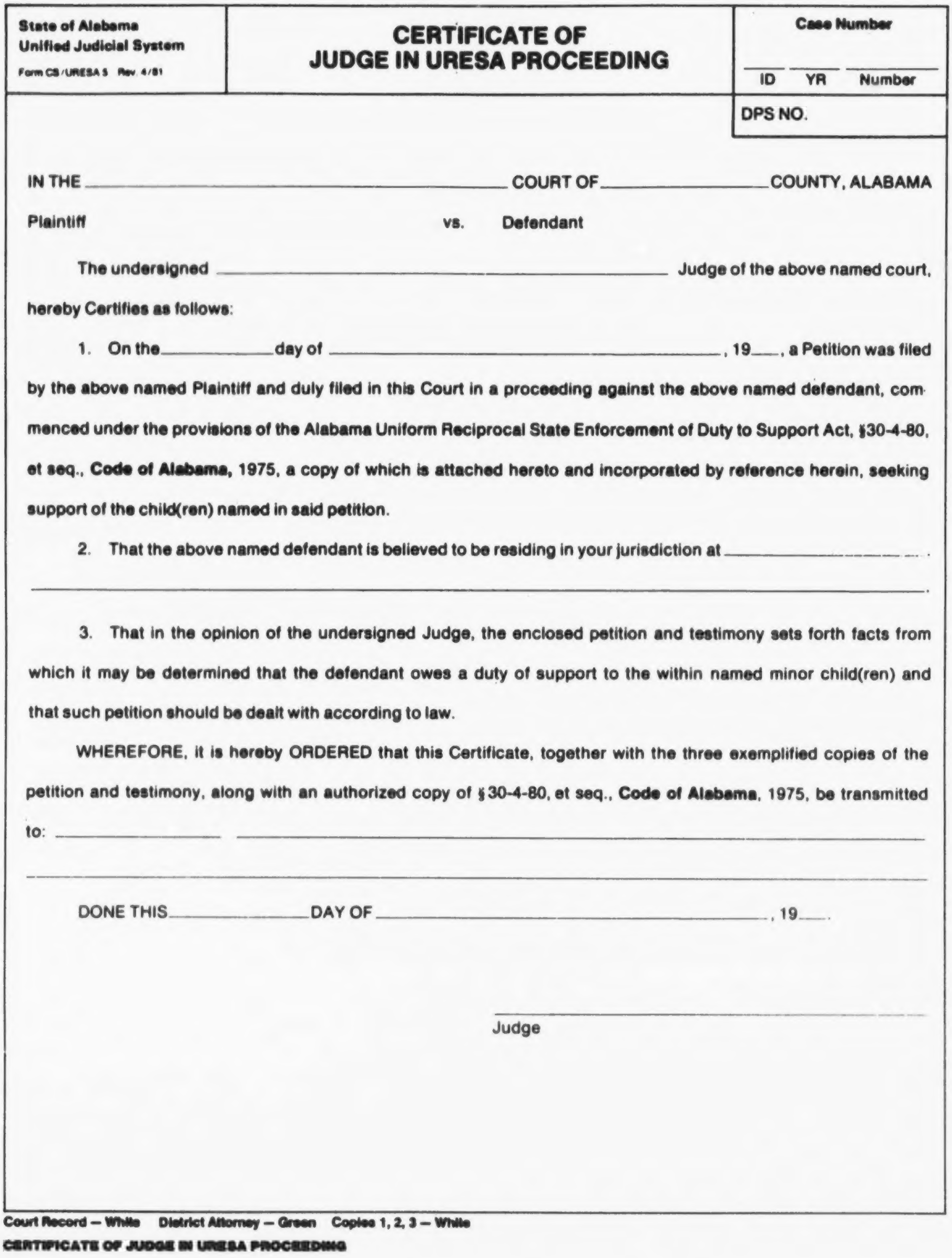
Further correspondence should be sent to:

PLEASE INDICATE ON GREEN COPY YOUR STATE'S COURT CASE NUMBER: ____________________

Original — White Copy — Green
TRANSMITTAL

*Source: Alabama Unified Judicial System

Exhibit 9.4*



State of Alabama **Unified Judicial System** Form CS/URESA 5 Rev. 4/81	**CERTIFICATE OF JUDGE IN URESA PROCEEDING**	**Case Number** ___ ___ ______ ID YR Number
		DPS NO.

IN THE ________________________ COURT OF ____________ COUNTY, ALABAMA

Plaintiff vs. Defendant

The undersigned ________________________ Judge of the above named court, hereby Certifies as follows:

1. On the ______ day of ____________________, 19___, a Petition was filed by the above named Plaintiff and duly filed in this Court in a proceeding against the above named defendant, commenced under the provisions of the Alabama Uniform Reciprocal State Enforcement of Duty to Support Act, §30-4-80, et seq., **Code of Alabama,** 1975, a copy of which is attached hereto and incorporated by reference herein, seeking support of the child(ren) named in said petition.

2. That the above named defendant is believed to be residing in your jurisdiction at ____________________ . ____ .

3. That in the opinion of the undersigned Judge, the enclosed petition and testimony sets forth facts from which it may be determined that the defendant owes a duty of support to the within named minor child(ren) and that such petition should be dealt with according to law.

WHEREFORE, it is hereby ORDERED that this Certificate, together with the three exemplified copies of the petition and testimony, along with an authorized copy of §30-4-80, et seq., **Code of Alabama**, 1975, be transmitted to: __________ ________________________________

____

DONE THIS ______ DAY OF ____________________, 19___.

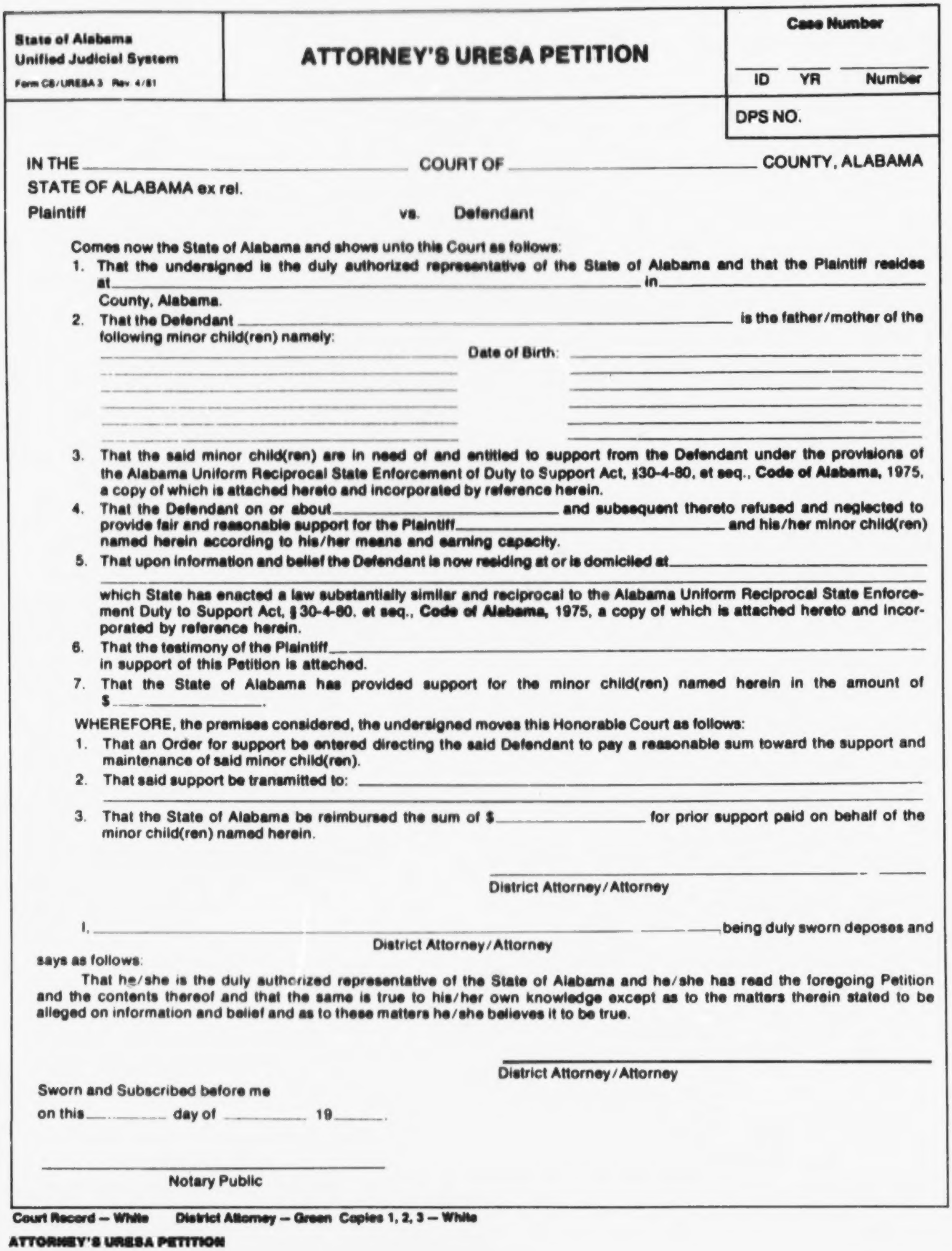
____
Judge

Court Record — White District Attorney — Green Copies 1, 2, 3 — White

CERTIFICATE OF JUDGE IN URESA PROCEEDING

***Source: Alabama Unified Judicial System**

Exhibit 9.5*



State of Alabama
Unified Judicial System
Form CS/URESA 3 Rev. 4/81

ATTORNEY'S URESA PETITION

Case Number
______ ______ ______
ID YR Number

DPS NO.

IN THE ______________________ COURT OF ______________________ COUNTY, ALABAMA

STATE OF ALABAMA ex rel.

Plaintiff vs. Defendant

Comes now the State of Alabama and shows unto this Court as follows:

1. That the undersigned is the duly authorized representative of the State of Alabama and that the Plaintiff resides at ______________________ in ______________________ County, Alabama.
2. That the Defendant ______________________ is the father/mother of the following minor child(ren) namely: ______________________ Date of Birth: ______________________
3. That the said minor child(ren) are in need of and entitled to support from the Defendant under the provisions of the Alabama Uniform Reciprocal State Enforcement of Duty to Support Act, §30-4-80, et seq., **Code of Alabama,** 1975, a copy of which is attached hereto and incorporated by reference herein.
4. That the Defendant on or about ______________________ and subsequent thereto refused and neglected to provide fair and reasonable support for the Plaintiff ______________________ and his/her minor child(ren) named herein according to his/her means and earning capacity.
5. That upon information and belief the Defendant is now residing at or is domiciled at ______________________ which State has enacted a law substantially similar and reciprocal to the Alabama Uniform Reciprocal State Enforcement Duty to Support Act, § 30-4-80, et seq., **Code of Alabama,** 1975, a copy of which is attached hereto and incorporated by reference herein.
6. That the testimony of the Plaintiff ______________________ in support of this Petition is attached.
7. That the State of Alabama has provided support for the minor child(ren) named herein in the amount of $ ______________.

WHEREFORE, the premises considered, the undersigned moves this Honorable Court as follows:

1. That an Order for support be entered directing the said Defendant to pay a reasonable sum toward the support and maintenance of said minor child(ren).
2. That said support be transmitted to: ______________________
3. That the State of Alabama be reimbursed the sum of $ ______________ for prior support paid on behalf of the minor child(ren) named herein.

____
District Attorney/Attorney

I, ______________________ being duly sworn deposes and
District Attorney/Attorney
says as follows:

That he/she is the duly authorized representative of the State of Alabama and he/she has read the foregoing Petition and the contents thereof and that the same is true to his/her own knowledge except as to the matters therein stated to be alleged on information and belief and as to these matters he/she believes it to be true.

____
District Attorney/Attorney

Sworn and Subscribed before me
on this ______ day of ______________ 19______.

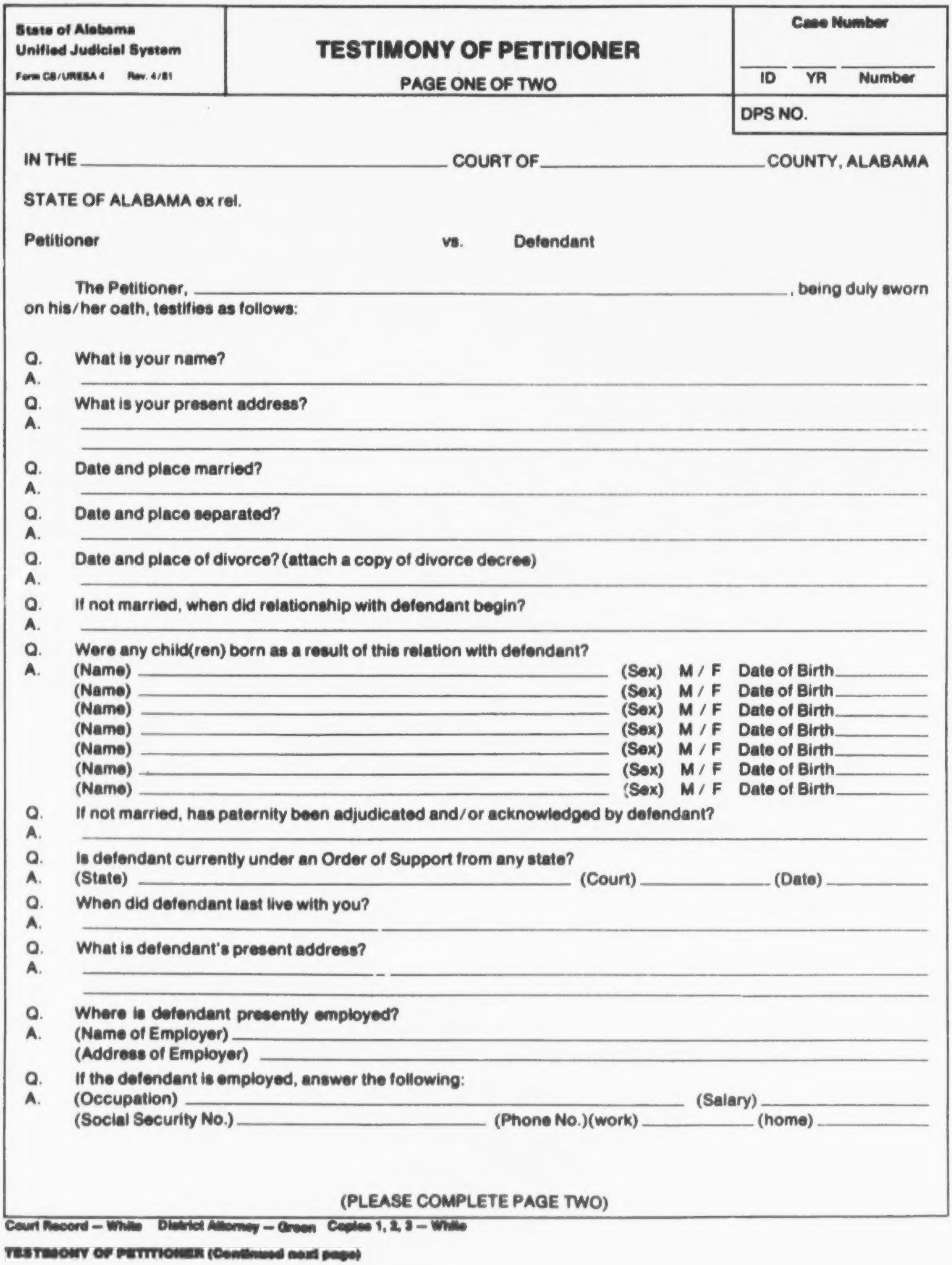
____
Notary Public

Court Record — White District Attorney — Green Copies 1, 2, 3 — White

ATTORNEY'S URESA PETITION

***Source:** Alabama Unified Judicial System

Exhibit 9.6*



State of Alabama
Unified Judicial System
Form CS/URESA 4 Rev. 4/81

TESTIMONY OF PETITIONER

PAGE ONE OF TWO

Case Number
ID ___ YR ___ Number ___

DPS NO.

IN THE ______________________ COURT OF ______________________ COUNTY, ALABAMA

STATE OF ALABAMA ex rel.

Petitioner vs. Defendant

The Petitioner, ______________________________, being duly sworn on his/her oath, testifies as follows:

Q. What is your name?
A. ______________________________

Q. What is your present address?
A. ______________________________
____

Q. Date and place married?
A. ______________________________

Q. Date and place separated?
A. ______________________________

Q. Date and place of divorce? (attach a copy of divorce decree)
A. ______________________________

Q. If not married, when did relationship with defendant begin?
A. ______________________________

Q. Were any child(ren) born as a result of this relation with defendant?
A. (Name) ______________________ (Sex) M / F Date of Birth ________
(Name) ______________________ (Sex) M / F Date of Birth ________
(Name) ______________________ (Sex) M / F Date of Birth ________
(Name) ______________________ (Sex) M / F Date of Birth ________
(Name) ______________________ (Sex) M / F Date of Birth ________
(Name) ______________________ (Sex) M / F Date of Birth ________
(Name) ______________________ (Sex) M / F Date of Birth ________

Q. If not married, has paternity been adjudicated and/or acknowledged by defendant?
A. ______________________________

Q. Is defendant currently under an Order of Support from any state?
A. (State) ______________ (Court) ____________ (Date) ____________

Q. When did defendant last live with you?
A. ______________________________

Q. What is defendant's present address?
A. ______________________________
____

Q. Where is defendant presently employed?
A. (Name of Employer) ______________________________
(Address of Employer) ______________________________

Q. If the defendant is employed, answer the following:
A. (Occupation) ______________________ (Salary) ____________
(Social Security No.) ______________ (Phone No.)(work) ____________ (home) ____________

(PLEASE COMPLETE PAGE TWO)

Court Record — White District Attorney — Green Copies 1, 2, 3 — White

TESTIMONY OF PETITIONER (Continued next page)

*Source: Alabama Unified Judicial System

State of Alabama **Unified Judicial System** Form CS/URESA 4 Rev. 4/81	## TESTIMONY OF PETITIONER (Continued) PAGE TWO OF TWO	**Case Number** ID YR Number

Q. Give a description of the defendant. (If available, attach photograph)
A. (Date of Birth) ____________ (Place) ____________
(Age) ________ (Height) ________ (Weight) ________ (Race) ________
(Sex) M / F (Marks or Scars) ____________ (Hair Color) ________
(Build) ____________ (Complexion) ________

Q. When and how much was defendant's last contribution for support?
A. ____________

Q. Are you employed? ____________ If yes, what are your earnings?
A. $ ________ per ________

Q. Have you any other source of income?
A. ____________

Q. If so, what is the source and amount?
A. ____________

Q. Are you in good health? (Yes) (No) If no, explain.
A. ____________

Q. Are the child(ren) in good health? (Yes) (No) If no, explain.
A. ____________

Q. List your monthly expenses and other outstanding debts:

A. Rent or mortage payment	$	School expense	$
Utilities and phone		Children's allowance	
Food		Charge Accounts (Total)	
Clothing		Loan payments	
Insurance (Life & health)		Other mon. exp.	
Auto payment & insurance		Total MON. EXP.	$
Auto operating expenses		OTHER O/S DEBTS	

Q. Have you ever filed a petition under the Uniform Reciprocal Support Act?
A. If yes, when and where? ____________

Q. Are you now receiving public aid?
A. ____________

Q. How long have you been receiving public aid?
A. ____________

____
Petitioner

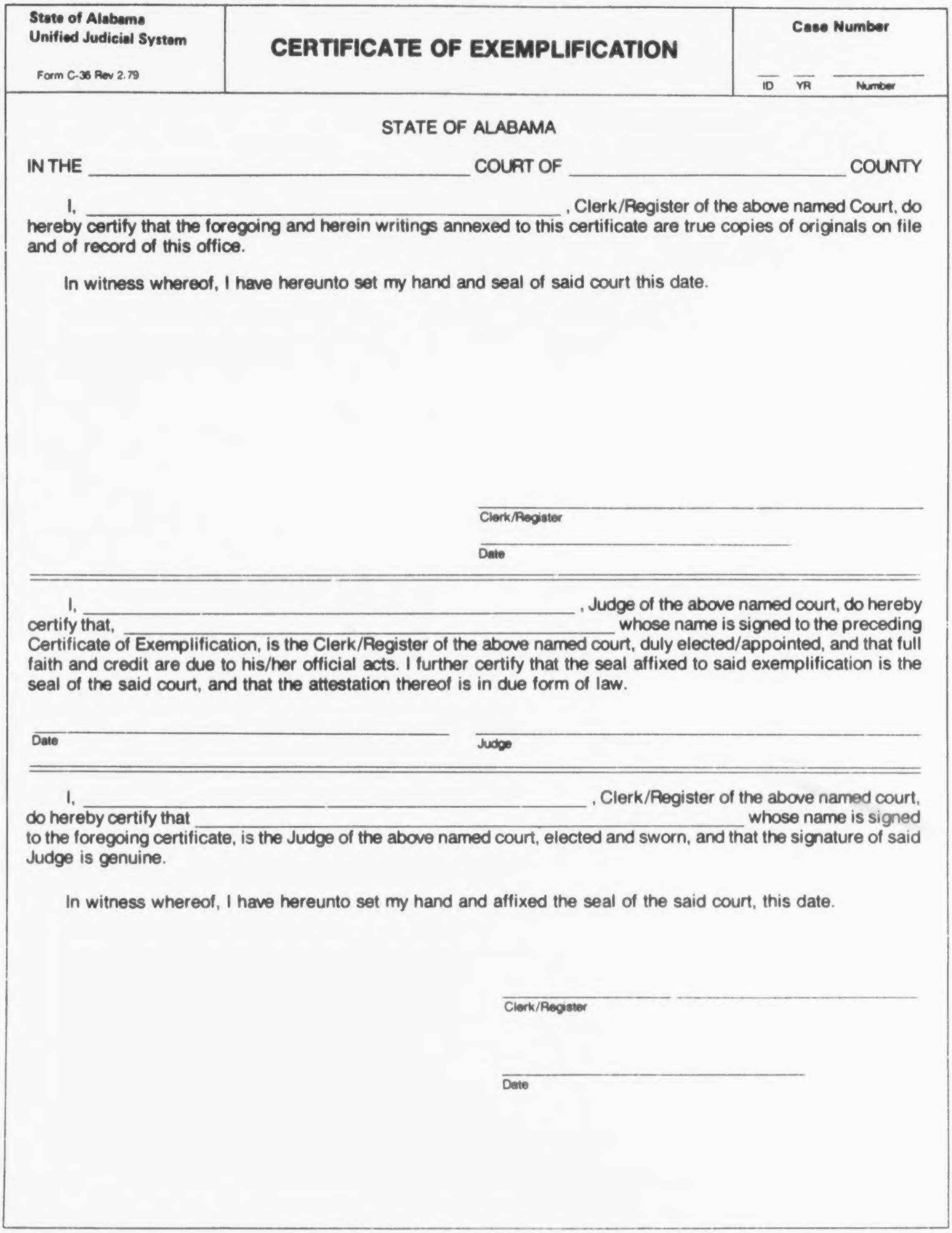
Sworn to and subscribed before me
(Date) ____________

____
Notary Public

Court Record — White District Attorney — Green Copies 1, 2, 3 — White

TESTIMONY OF PETITIONER (Continued)

Exhibit 9.7*



State of Alabama **Unified Judicial System** Form C-36 Rev 2.79	**CERTIFICATE OF EXEMPLIFICATION**	**Case Number** ___ ___ ________ ID YR Number

STATE OF ALABAMA

IN THE ______________________ COURT OF ______________________ COUNTY

I, ______________________, Clerk/Register of the above named Court, do hereby certify that the foregoing and herein writings annexed to this certificate are true copies of originals on file and of record of this office.

In witness whereof, I have hereunto set my hand and seal of said court this date.

____
Clerk/Register

____
Date

I, ______________________, Judge of the above named court, do hereby certify that, ______________________ whose name is signed to the preceding Certificate of Exemplification, is the Clerk/Register of the above named court, duly elected/appointed, and that full faith and credit are due to his/her official acts. I further certify that the seal affixed to said exemplification is the seal of the said court, and that the attestation thereof is in due form of law.

______________________ Date
______________________ Judge

I, ______________________, Clerk/Register of the above named court, do hereby certify that ______________________ whose name is signed to the foregoing certificate, is the Judge of the above named court, elected and sworn, and that the signature of said Judge is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, this date.

____
Clerk/Register

____
Date

***Source:** Alabama Unified Judicial System

EXHIBIT 9.8*

IN THE CIRCUIT COURT OF (responding) ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.) ________________________________,) Assignee,)) and) ________________________________) Assignor,) Plaintiffs,) vs.) ________________________________,) Defendant.))	Case No. ______________ **PETITION FOR REGISTRATION OF FOREIGN SUPPORT ORDER UNDER PART IV OF THE UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (URESA)**

Come now Plaintiffs, by and through ____________________________, and allege that:

1. __________________________ is the plaintiff in the above-named action and resides at ____.

2. __________________________________, defendant, was ordered to pay $ ___________ for support, pursuant to a support order of _______________, a certified copy of which is attached hereto and made a part of this petition.

3. As of ______________________________, 19 ___, $________ remains unpaid; a copy of the pay record affidavit is attached hereto and made a part of this petition.

4. The aforementioned support order is registered in the following States: ____
____

WHEREFORE, _________________________________ prays for an Order to register the Support Order and confirm the amounts remaining unpaid.

____

____
District Attorney

____
By Assistant District Attorney

*Source: Missouri Prosecutor's Deskbook, Form 58-2.

STATE OF ______________________)
) SS
COUNTY OF _____________________)

____________________________________, being duly sworn, deposes and says that (s)he is the plaintiff herein, and that (s)he has read the foregoing petiton and knows the contents thereof, and the same is true of her own knowledge, except as to matters therein stated to be alleged on information and and belief, and those matters (s)he believes to be true.

____
Name

Subscribed and sworn to before me this _______ day of __________________________, 19 ___.

____
Notary Public

My Commission expires ____

EXHIBIT 9.9*

IN THE CIRCUIT COURT OF (responding) ______________ COUNTY
STATE OF ________________

State of ________________, ex rel.) ____________________________________,) Assignee,)) and) ____________________________________) Assignor,) Plaintiffs,) vs.) ____________________________________,) Defendant.))	Case No. _______________ NOTICE OF REGISTRATION

NOTICE OF REGISTRATION

Notice is hereby given to the defendant, ________________________, that, pursuant to Section _______________ of the Statutes of the State of ____________________, an order was registered in the office of the Clerk of the Circuit Court on _________________________, 19 ___. Attached is a certified copy of the order directing you to make support payments.

In accordance with Sections _________________________ of the Statutes of ____________________, you have thirty (30) days from the date of this Notice to petition the Circuit Court of _________________________ County to vacate the registration or for other relief.

If you should fail to petition the Court within the thirty-day period, the court will confirm the support order and enforce it against you.

____

____
District Attorney

____
by Assistant District Attorney

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*Source: Missouri Prosecutor's Deskbook, Form 58-3.

EXHIBIT 9.10*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
__________________________________,)
Assignee,)
)
and)
__________________________________)
Assignor,)
Plaintiffs,)
vs.)
__________________________________,)
Defendant.)
)

Case No. ______________

ORDER CONFIRMING REGISTRATION OF SUPPORT ORDER

NOW, on this ___________ day of ___________________________, 19 ____, upon consideration of the petition filed in this cause, it is hereby

ORDERED, ADJUDGED, AND DECREED that the registration of the above-entitled support order of the State of ______________________________ is confirmed and $ ____________ remains unpaid as of __________________________.

____
Judge

DATED: ________________________

*Source: Missouri Prosecutor's Deskbook, Form 58-4.

CHAPTER 10
Paternity Establishment

INTRODUCTION

> Through the ages, the status of illegitimacy has expressed society's condemnation of irresponsible liaisons beyond the bonds of marriage. However, visiting such condemnation on the head of an infant is illogical and unjust. Moreover, imposing difficulties on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the illegitimate child is an ineffectual and unjust way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise. [Weber v. Aetna Casualty and Surety Co., 406 US 164, 92 SCt 1400, 1406-07, 31 LEd2 768 (1972).]

With this case, the U. S. Supreme Court initiated the constitutional transformation of the status of children born out of wedlock. The common law beheld the illegitimate child as filius nullius--the child of no one. The status was so undefined that the legal tie between the child and his or her mother was not easily established, and no legal mechanism existed to establish paternal identity.[1] Since 1968, the Supreme Court has handed down a number of decisions that dictate that neither the Federal government nor the States may discriminate against illegitimate children without a substantial and proper State interest as justification. [See Levy v. Louisiana, 391 US 68, 88 SCt 159, 20 LEd2d 436 (1968); Glona v. American Guarantee and Life Ins. Co., 391 US 73, 88 SCt 1515, 20 LEd2d 441 (1968); Labine v. Vincent, 401 US 532, 91 SCt 1017, 28 LEd2d 288 (1971); Weber v. Aetna Casualty and Surety Co., supra; Gomez v. Perez, 409 US 535, 93 SCt 872, 35 LEd2d 56 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 US 619, 93 SCt 1700, 36 LEd2d 543 (1973); Jimenez v. Weinberger, 417 US 628, 94 SCt 2496, 41 LEd2d 363 (1974); Mathews v. Lucas, 427 US 495, 96 SCt 2755, 49 LEd2d 651 (1976); Trimble v. Gordon, 430 US 762, 97 SCt 1459, 52 LEd2d 31 (1979); Lalli v. Lalli, 439 US 259, 99 SCt 518, 58 LEd2d 503 (1978); United States v. Clark, 445 US 23, 100 SCt 895, 63 LEd2d 171 (1980).]

Concomitant with the establishment of constitutional rights for children born out of wedlock were two other social trends. The first and foremost was the growth of out-of-wedlock births. The second was a growing sensitivity in Congress and State legislatures regarding the importance of paternity establishment to the child, and the cost to society of supporting a significant percentage of these children through public assistance. [See the Introduction to this Handbook.] Thus, the creation of an equal right to support coincided with an increased awareness of the need to quantify and enforce that right. Congress responded in 1975 by creating the Child Support Enforcement Program.

In 1975, Congress enacted Part D of Title IV of the Social Security Act, entitled "Child Support and Establishment of Paternity." Sections 454(4) and (6) of the Act [42 USC 654(4) and (6), respectively] require each State plan for child support enforcement to provide that the State, and all relevant political subdivisions, will endeavor to establish the paternity of all children who were born out of wedlock and who receive AFDC or who have made application for non-AFDC services. Section 454(9) [42 USC 654(9)] extends the responsibility to include cooperation with other States in establishing paternity across State lines. Thus, the establishment of paternity is not merely an ancillary responsibility to that of collecting child support. The Federal statute clearly establishes an independent obligation on the States to seek paternity establishment in its own right.

Neither the Social Security Act nor Federal regulations dictate the form that paternity establishment must take. Clearly, since the main concern of the IV-D Program is support enforcement, any method of establishment must be binding on the alleged father and must include an enforceable support obligation. Traditionally, in our legal system, facts are established and obligations are imposed through the entry of a "judgment," or its legal equivalent. This chapter will assume that in order to fulfill the statutory responsibility, such formality is necessary.

PRELIMINARY ISSUES

Jurisdiction

Two fundamental issues must be resolved prior to filing a paternity action:

- Which local court possesses subject matter jurisdiction over paternity actions?
- Can that court obtain personal jurisdiction over the prospective parties to the action, requisite to render a valid, enforceable judgment of paternity?

Where the alleged father resides within the State, the issue of subject matter jurisdiction ordinarily is resolved by simple reference to the State's paternity statute. In addition to filing an action pursuant to the paternity statute, it is sometimes possible to file an action under a Declaratory Judgment Statute,[2] or under the intrastate mechanism of the Uniform Reciprocal Enforcement of Support Act (URESA). Using such an alternative can be an effective way to avoid filing actions under an outmoded criminal bastardy statute, of creating subject matter jursidiction in a court that lacks specific statutory authority, and perhaps of avoiding the necessity of granting the alleged father a trial by jury.

Paternity actions are *in personam* in nature,[3] meaning that the court must obtain jurisdiction by service of process made on the defendant in accordance with State statute or court rule. For defendants located within a State's territorial boundaries, State service of process and venue statutes and court rules should be consulted.

The thornier legal issue arises when the alleged father resides out of State and cannot be served within the State. Most attorneys approach this problem by filing a URESA action. Section 27 of the 1968 version of the Act specifically provides for interstate paternity determinations. In addition to the language in the newer version of the Act, most appellate courts that have considered the issue have held that paternity jurisdiction is included in the original version of the Act as well. [See *Clarkston v. Bridge*, 539 P2d

1094 (Or. banc 1975); State of Iowa ex rel. Nauman v. Troutman, 623 SW2d 269 (Mo.App. 1981); 81 ALR3d 1175 (1977).] Due to evidentiary problems, which make contested URESA paternity cases difficult to pursue, and the reluctance of some jurisdictions to cooperate in interstate paternity establishment, it may be more effective to bring the action in the State where the children reside. A thorough, though outdated, annotation of this issue appears at 76 ALR 3d 708 (1977). [See also Levy, "Asserting Jurisdiction Over Nonresident Putative Father in Paternity Actions," 45 U.Cinn.L.Rev. 207 (1976).]

In Pennoyer v. Neff, 95 US 714, 24 LEd 565 (1878), the U.S Supreme Court established the principle that a court's jurisdiction over persons is generally coextensive with the boundaries of the State in which it sits. During the next several decades, exceptions to this general rule developed to allow courts to exert jurisdiction over persons no longer physically present within the State. The exceptions very nearly devoured the rule and tread heavily on the due process clause of the 14th Amendment to the U.S. Constitution. The high court responded with the landmark case of International Shoe v. Washington, 326 US 310, 66 SCt 154, 90 LEd 95 (1945), which set forth the familiar principle that a court may exercise jurisdiction over out-of-State defendants whose prior presence or activity within the State amounted to certain "minimum contacts" with the State, such that "traditional notions of fair play and substantial justice" are not offended by allowing the suit to be maintained in that court. Subsequently, in Hansen v. Denkla, 357 US 235, 78 SCt 1288, 2LEd2d 1283 (1958), the Court added the requirement that the defendant's contact with the forum State must have been purposeful and of a nature that availed him of some benefit conferred by the State along with the privilege of conducting the activity that constituted the contact.

The U.S. Supreme Court has had no opportunity to apply this line of case law to a paternity action maintained against an out-of-State alleged father.[4] Nevertheless, many State courts have been presented with the issue. The emerging test for personal jurisdiction is two-pronged, requiring the existence of and compliance with a State statute or court rule which authorizes service of process outside the State, and facts that meet the International Shoe/Hansen v. Denkla due process requirements.

Because few States have enacted long-arm statutes that specifically provide for extraterritorial service of process in paternity actions, much of the case law has centered on the first prong of the test. The issue is: does the defendant's alleged participation in the conception of the child or his subsequent failure to support him or her, amount to a "tort," as the term is used in the long-arm statute? The split of authority on this issue has been roughly even. At least six courts have broadened the definition of tort to encompass the paternity and support action. [Poindexter v. Willis, 87 Ill.App.2d 213, 231 NE2d 1 (1967); State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 NW2d 140 (1974); Howells v. McKibben, 281 NW2d 154 (Minn. 1979); Neill v. Ridner, 153 Ind.App. 149, 286 NE2d 427 (1972); Bakora v. Balkin, 14 Ariz.App. 569, 485 P2d 292 (1971); In re Miller, 86 Wash.2d 712, 548 P2d 542 (1976); Black v. Rasile, 318 NW2d 475 (Mich.Ct.App. 1980).]

An equally impressive number of courts have refused to stretch the tort definition. [State ex rel. Larimore v. Snyder, 291 NW2d 241 (Neb. 1980); Howard v. Craighead Co. Ct., 613 SW2d 386 (Ark. 1981); Barnhart v. Madvig, 526 SW2d 106 (Tenn. 1975); A.R.B. v. G.L.P., 180 Colo. 439, 507 P2d 468 (1973); State ex rel. Carrington v. Schutts, 217 Kan. 175, 535 P2d 982 (1975); Anonymous v. Anonymous, 49 Misc2d 75, 268 NYS2d 710 (Fam.Ct. 1966); State ex rel. McKenna v. Bennett, 28 Or.App. 155, 558 P2d 1281 (1977); In re Jane Doe 38 Wash.App.251, 684 P2d 1368 (1984); Illinois v. Flieger, 124 Ill.App.3d 604, 80 Ill.Dec. 739, 465 NE2d 1376 (1984).] These decisions have noted that, logically, the broad definition of tort (duty plus breach) applies only to the support claim, which is ancillary to the underlying action for declaration of paternity. The act of sexual intercourse itself, even given the resulting conception, does not cause tortious injury or damages, so the argument goes. The alleged father's subsequent breach of his duty of support is analogous to the legal concept of "tort." Nevertheless, since it was solely the act of sexual intercourse that occurred within the forum State in each of the cited cases, the courts were held to lack jurisdiction over the underlying claim, and the ancillary claim failed along with it.

As one would expect, the "no tort" decisions do not analyze the second prong in the test--"the minimum contacts" analysis. Two "protort" cases, Howells v. McKibbin, supra, p. 157, and Larsen v. Scholl, 296 NW2d 785, 788 (Iowa 1980), set forth the following five criteria:

- The quantity of the alleged father's contacts with the forum State
- The nature and quality of those contacts
- The source and connection of the paternity action with those contacts
- The interest of the forum State in paternity establishment and support enforcement
- The convenience or inconvenience to the parties that results from allowing the forum State to assert jurisdiction.

In both of these cases, which involved repeated social and sexual intercourse within the forum State, a mother and child very much in need of financial support from the alleged father and an alleged father who lived nearby in a neighboring State, jurisdiction was held to exist. Four appellate courts have rendered contrary decisions where the child was conceived out of the State, despite the forum State's recognized strong interest in providing a remedy. [Ulmer v. O'Malley, 307 NW2d 775 (Minn. 1981); Bartlett v. Superior Ct., 86 Cal.App.3d 72, 150 Cal.Rptr.25 (1978); Barnhart v. Madvig, supra; State v. Shaffer, --- P2d --- 11 FLR 1100 (Ariz. App. 1984).]

Right to Appointed Counsel

Does an indigent paternity defendant have an absolute constitutional right to counsel at public expense?[5] Recent decisions have held that no such absolute right exists, at least under the Due Process Clause of the U. S. Constitution. [State ex rel. Hamilton v. Snodgrass, 325 NW2d 740 (Iowa 1982); Wake Co. ex rel. Carrington v. Townes, 293 NE2d 95 (N.C. 1982); Nordgren v. Mitchell, 716 F2d 1335 (CA10 1983); State ex rel. Adult and Family Serv. Div. v. Stoutt, 57 Or.App. 303, 644 P2d 1132 (1982). See also Sheppard v. Mack, 68 Ohio.App.2d 95, 427 NE2d 522 (1980); State v. Walker, 87 Wis.2d 443, 553 P2d 1093 (1976) and Johnson v. James, 38 Wash.App.264, 10 FLR 1564 (1984).] Prior to these decisions, a contrary rule was emerging, as exemplified by the California Supreme Court's decision in Salas v. Cortez, 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P2d 226, cert. den. 444 US 900, 100 SCt 209, 62 LEd2d 136 (1979).[6] The recent change can be attributed to the U.S. Supreme Court's decision in Lassiter v. Dept. of Social Services, 452 US 18, 101 SCt 2113, 68 LEd2d 640 (1981).

Lassiter involved a parental rights termination proceeding instituted against an indigent mother. The Court held that an absolute right to appointed counsel exists only where an indigent defendant is likely to be incarcerated or receive comparable loss of liberty as a result of the present proceeding, should he or she not prevail. Where no immediate potential for incarceration exists, a strong presumption against appointment of counsel arises. This presumption may be rebutted. [Mathews v. Eldridge, 424 US 319, 96 SCt 893, 47 LEd2d 18 (1976).] Under the Eldridge analysis, a qualified right to appointed counsel exists where the defendant's substantial interest in the outcome outweighs the government's interest in economical and informal proceedings and where there exists a serious risk of any erroneous decision in the absence of counsel.[7] The first four cases cited in the above paragraph apply this analysis to paternity cases brought against indigent alleged fathers by IV-D agencies.

Most post-Lassiter decisions concede that a man who is found to be a child's father in a paternity action runs a risk of future incarceration for civil contempt or criminal nonsupport and that the paternity judgment may be binding in such a proceeding. Nevertheless, the developing trend holds that the delayed and indirect nature of the threat to the defendant's liberty interest creates a presumption against the right to counsel.[8] The trial court must decide whether the presumption is overcome in any given paternity case after conducting the balancing test set out above. The holdings point out that the alleged father's interest in the outcome of the action is substantial in both social and economic terms and that the State shares an interest in accurate paternity determinations.

Despite these considerations, which tend to favor a right to appointed counsel, representation of the alleged father in the ordinary paternity case is not likely to decrease significantly the risk of erroneous decisions. The courts noted that paternity actions normally do not involve complex evidentiary issues and that genetic paternity test results will weed out erroneous allegations. As a result, the decisions appear to stand for the proposition that only in complex evidentiary situations should the balancing test result in a due process right to appointed counsel.[9] Clearly, the trial court is vested with a broad discretion in making the determination on a case-by-case basis.

Two decisions have been rendered by State appellate courts, subsequent to Lassiter, that apply the Eldridge test to the paternity situation and reach the opposite result. In Kennedy v. Wood, 439 NE2d 1367 (Ind.App. 1982) and Corra v. Coll, 451 A2d 480 (Pa.Super. 1982), the appellate courts in Indiana and Pennsylvania concluded that paternity actions are inherently complex, and that a significant risk of erroneous decision exists whenever an indigent alleged father is not represented by counsel. That being the case, indigent alleged fathers are guaranteed a right to counsel in all paternity actions brought on behalf of the State. The significance of these two holdings should not be underestimated, given the trial court's broad discretion in applying the test.

Occasionally, defendants will argue that because the IV-D agency provides counsel for the plaintiff in the paternity cases, the State has an obligation under the Equal Protection Clause to afford the defendant with the same benefit. Courts have held that a State's practice of representing plaintiffs and not defendants in paternity actions is rational and therefore constitutional, due to the common interest shared by the State and the plaintiffs. [Dept. of Health and Rehab. Services v. Heffler, 382 So2d 301 (Fla. 1980); State ex rel. Hamilton v. Snodgrass, supra, p.744.]

Two other decisions related to this topic are instructive. In Ramsey Cty. Public Defenders Office v. Fleming, 294 NW2d 275 (Minn. 1980), the Minnesota Supreme Court held that where an indigent alleged father is given a right to appointed counsel by statute, the State must inform him of that right prior to proceeding to judgment. White v. Gordon, 460 A2d 828 (Pa.Super. 1983) held that nonindigent alleged fathers must be afforded a reasonable opportunity to obtain counsel.

Right to State-Financed Paternity Testing[10]

While the legal opinion seems to be changing as to the alleged father's right to appointed counsel, no such trend is occurring in the area of genetic paternity testing. The U.S. Supreme Court's decision in Little v. Streater, 452 US 1, 101 SCt 2202, 68 LEd2d 627 (1981), and several State court decisions have firmly established the right of indigent alleged fathers to State-financed genetic paternity tests. Most of the courts applied the Eldridge test and concluded that the risk of erroneous decision is simply too high in the absence of scientific testing. [Anderson v. Jacobs, 68 OhioSt.2d 67, 428 NE2d 419 (1981). See also Michael B. v. Superior Ct., 150 Cal.Rptr. 586 (Cal.App. 1978); Walker v. Stokes, 344 NE2d 159 (Ohio App. 1975); Franklin v. Dist.Ct., 571 P2d 1072 (Colo. 1977).]

Other courts have construed the State's version of the Uniform Parentage Act (UPA) to create a right in the parties to the tests, given the mandatory language in the statute forcing the court to order the tests upon the request of either party. Once such a right is recognized, equal protection may be held to prohibit the conditioning of the right on the alleged father's ability to pay. [Keesee v. Gue, 266 SE2d 146 (W.Va. 1980).] Still other courts have extended the right to State-financed tests on the theory that such tests are necessary to the alleged father's defense and are part and parcel of his right to appointed counsel, which exists in the State by reason of statute or case law. [M. v. S., 169 N.J.Super. 209, 404 A2d 653 (1979).]

The Supreme Court made much of the criminal nature of the Connecticut bastardy statute, and its peculiar provision that requires the alleged father to bear the burden of proof on the ultimate issue where the complaining witness is constant in her allegation. [452 US, at 12.] Under such a reading of Little, a statutory scheme that is truly civil and that places the burden of proof on the plaintiff at all times might not create a right to State-financed paternity testing for indigent defendants. Nevertheless, the trend in the appellate court seems to be to apply Little to all types of paternity statutes.

In what is perhaps the most troubling decision on this issue, the Georgia Supreme Court has held that the State must finance the tests whenever it is the moving party, regardless of the financial condition of the alleged father. [Boone v. State, Dept. of Human Resources, 250 Ga. 379, 279 SE2d 727 (1982).] The decision points out that to allow the court to order the defendant to pay for even a portion of the test costs prior to a determination of paternity constitutes a "taking" without the necessary due-process hearing. It might be possible to avoid the effect of this holding by asking the court for a preliminary hearing to determine the strength of the plaintiff's case; the statutes of many States provide for such hearings.[11] The Boone decision specifically did not invalidate the court's authority to include in its eventual judgment a provision assigning the test costs to the losing party. According to appointed counsel decisions, a cost judgment may be entered against an indigent defendant with the proviso that he enjoys an exemption from execution of the judgment as long as his indigency continues. [M.v.S., supra, citing Fuller v. Oregon, 617 US 40, 53, 94 SCt 2116, 2124, 40 LEd2d 642 (1974).]

Right to Jury Trial

State statute generally determines whether a judge or jury will try a paternity proceeding. The issue finds its way into appellate case law when a State updates its paternity statute to provide for court-tried cases only, where the statute is ambiguous or silent on the issue or where the State opts to file its paternity cases under a statute other than the paternity statute in order to avoid jury trials. Clearly, avoiding the paternity statute is possible only where it is cumulative of other remedies, and where a substitute remedy, such as a Declaratory Judgment Act or the URESA mechanism, exists. The issue also can arise where a local rule provides that unless a jury trial is requested in a specific manner by a specific date, the statutory right to trial by jury shall be deemed waived. The manner in which a constitutional right can be waived differs from the manner in which a mere statutory right can be waived, so the classification of the right can be important.

The historical nature of paternity proceedings as quasicriminal, and the fact that the State, with all its resources and expertise, is maintaining the action, can cause a judge to react favorably to the alleged father's demand for trial by jury. It is crucial to deflect this initial reaction, and somehow devise a method of insuring that paternity trials are to the bench. Jury trials are not appropriate for paternity cases for a number of reasons:

- Docket delays of over a year are not uncommon.
- Jury trials can last several days, using up valuable court and attorney time, whereas a bench trial normally can be completed in half a day.
- The evidence is of a highly personal nature and, as is the case with other family law litigation, should not be affected by the chilling effect of public disclosure.
- The delay factor acts in the favor of the alleged father by allowing him additional freedom from his support obligation, which has the further effect of providing a disincentive to negotiation and settlement.

The case law in this area gives cause for optimism. Courts that have addressed the issue of an alleged father's constitutional right to trial by jury in a paternity case have found that right to be nonexistent. [State ex rel. Goodner v. Speed, 96 Wash.2d 838, 640 P2d 13 (1982); State ex rel. Thomas v. Cahill, 443 A2d 497 (Del.Super. 1982); Robertson v. Apuzzo, 170 Conn. 367, 365 A2d 824 (1976).]

Since the Seventh Amendment does not apply to the States, the constitutional analysis centers on the language of the applicable State constitution. State constitutions generally contain a clause which reads something like "the right of trial by jury shall remain inviolate."[12] This type of clause generally is construed to mean that any right to jury trial that existed at common law, on either the date the constitution was adopted or the date the constitution specifies as being applicable, cannot be abridged by legislative enactment. The three decisions cited above note that there was no such thing as a common law action for declaration of paternity and support, illegitimate children being without a common law right to support from their fathers. That being the case, no right to jury trial existed and the legislature is free to grant or revoke the statutory right at any time. The Robertson case is particularly interesting; it holds, at p. 832, that the State may deny a jury trial to those alleged fathers who are unable to tender a $100 fee.

The fee was held to be rational, given the additional costs inherent in jury trials, and thus free from equal protection problems.

Statutes of Limitation

The existence and extent of statutory limitations placed upon the bringing of paternity actions vary widely among jurisdictions. The Uniform Act on Paternity (UAP), 9A U.L.A. sec. 3, encourages States to enact a limitation only as to the father's liability to reimburse the plaintiff for support provided to the child in the past in lieu of a limitation that would bar the action for declaration of paternity. At least one court has construed a general statute of limitation to operate in such a manner. [Winston v. Robinson, 270 Ark. 996, 606 SW2d 757 (1980).] In 1979, the Minnesota Supreme Court went one step further by holding that the continuing nature of the support obligation tolls the operation of any statute of limitation throughout the child's minority. [D. v. R., 277 NW2d 27 (Minn. 1979). See also, Sutherland v. Hurin, 605 P2d 1133 (Mont. 1980); Matter of M.D.H., 437 NE2d 119 (Ind.App. 1982); 16 ALR 4th 926 (1982).]

Numerous recent cases have analyzed statutes of limitation, as applied to paternity actions, for possible equal protection violation. The applicable equal protection standard was set forth in Gomez v. Perez, 409 US 535 (1973), which requires all States to provide illegitimate children an opportunity to obtain paternal support on a more or less equal footing with the opportunity provided legitimate children. The decisions of State courts have been decidedly inconsistent.[13] Recently, the U.S. Supreme Court has handed down two decisions on point. In Mills v. Hableutzel, 456 US 91, 102 SCt 1549, 71 LEd2d 770 (1982), the Court struck down the Texas 1-year statute of limitation. In Pickett v. Brown, 103 SCt 2199, 76 LEd2d 372 (1983), the Tennessee 2-year statute was invalidated.

Under both decisions, the first issue in the equal protection analysis is whether the limitation period is sufficiently long to provide those with an interest in illegitimate children to bring suit on their behalf. Justice O'Connor's concurring opinion in Mills, p. 105, and Justice Brennan's majority opinion in Pickett both stress that the mother's strained financial condition and the possibility that she may be trying to maintain her relationship with the child's father as well as other social and economical factors may act to inhibit her from filing an action against the father. The fact that a statute may toll the running of the limitation period where the father is providing support or has acknowledged his paternity in writing, or that an exception is made for children who are likely to become public charges, does not necessarily act to mitigate the inhibiting factors in a significant number of potential paternity actions. [Pickett, p. 2209.]

The second issue for inquiry under the two holdings is whether the time limitation placed on the bringing of the action is substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. Both 1- and 2-year periods fail this test. The fact that in Texas and Tennessee the limitation periods applicable to other legal actions are tolled during a child's minority was seen to damage seriously the States' argument that the statutes were necessary to avoid stale or fraudulent claims. Many civil actions are fraught with problems of proof, but the States could offer no justification for treating paternity actions differently. Both decisions pointed out that recent developments in scientific paternity testing attenuate any connection between the statute and a State's interest in avoiding stale or fraudulent claims, although both decisions refused to go so far as to hold that the availability of the tests negates a State's interest altogether.[14]

It seems clear that the rationale behind Mills and Pickett will eventually be applied to periods in excess of 2 years, but the point at which a State's interests begin to outweigh the illegitimate child's fundamental need for paternity establishment is unclear. The equal protection test is too subjective to provide a predictable answer. The only clues currently available come from recent State court decisions. Three-year statutes of limitation have been struck in Montana; North Carolina; Kentucky, and West Virginia. In Florida, a 4-year statute has been invalidated. Six-year periods have been upheld in Michigan and struck in Oregon.[15] Pennsylvania rejected an equal protection challenge to its 6-year limitation on establishing paternity. This decision was appealed to the U.S. Supreme Court but remanded when the Pennsylvania State legislature subsequently repealed the statute. [Paulussen v. Herion, 483 A2d 892 (1984).] Louisiana's new 19-year statute was upheld in In re Grice,--- So2d ---, 11 FLR 1173 (La.App. 1985).

In addition to attacking the constitutionality of a statute of limitation, it is often possible to avoid its application to a specific case by bringing the case within a tolling provision. As noted above, it may be helpful to argue that a provision which tolls the running of all limitation periods during a child's minority supersedes the limitation period contained in the paternity statute. To succeed with such an argument, it will be necessary to convince the court that the instant action is being brought on behalf of the child and not on behalf of the mother (so the choice of parties-plaintiff may be crucial). Because many judges think of the custodial parent as the support obligee, this may be a difficult point to make. However, both of the U.S. Supreme Court decisions attack the issues from the child's perspective.

Other facts that may amount to a tolling of the statutory period include an oral or written acknowledgment of paternity, providing support for the child, or leaving the jurisdiction.[16] Also the defendant generally must inject the bar of a statute of limitations as an affirmative defense or it is deemed waived.[17] Thus, the existence of the statute does not completely bar the door to the courthouse. This can be particularly important to remember whenever the alleged father appears potentially sensitive to the publicity a paternity action would cause.

Congress addressed the statute of limitations issue in the Child Support Enforcement Amendments of 1984. Federal regulation 42 USC 666(a)(5) now requires each State to enact laws that provide "procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." Compliance with this requirement will decide many of the issues raised above, at least as to cases in which the child is conceived or born after the change in the statute of limitation or within the previous statutory period. Congress' language would seem to require application of the new statutory period to existing cases as well. Because statutes of limitation generally are viewed as procedural, being a potential bar to the remedy and not the underlying cause of action, a change may be implemented retrospectively. [See Roe v. Doe, 581 P2d 310 (Hawaii 1973); Wolf v. Goin, 552 P2d 258 (Or.App. 1975); Sutherland v. Hurin, 605 P2d 332 (1980); State v. Preston, 409 A2d 792 (N.H. 1979).] Nevertheless, some courts and legislatures may conclude to apply the change prospectively. For these States, the recent case law, discussed above, will continue to be relevant as Program attorneys seek to avoid the bar of a previous statutory period.

Settlements

Two issues come up regarding the settlement of paternity cases. First, what effect does a settlement agreement between the mother and alleged father, which predates the opening of the IV-D case, have on the State's ability to establish paternity or modify the support amount? Second, what procedure must be employed to create a valid, enforceable consent judgment? Since the overwhelming majority of IV-D paternity actions are resolved by way of agreement, the importance of the answers to these questions cannot be overstated.

Assume that the mother and the alleged father have entered into an agreement whereby she agreed not to press a paternity action against the alleged father in exchange for a lump sum payment of $500. Assume further that the agreement was a simple out-of-court settlement, with no judicial scrutiny or approval, and assume that the alleged father complied with his agreement to pay the $500. Now assume that circumstances change. Either the mother becomes financially destitute and turns to AFDC for support of the child, or she decides to renege on her agreement and applies for non-AFDC paternity establishment services. Does she, or does the child, still have a cause of action?

Until recently, the validity of such an agreement was judged solely on simple contract principles, and the mother generally was barred from further legal action if there was consideration behind the agreement. In our example, the mother benefitted by receiving $500 and suffered a detriment by giving up her cause of action. Thus, the older cases would have held the consideration sufficient to classify the agreement as a contract, and the mother would have been estopped from bringing suit, despite the clear folly of her agreement and its adverse impact on her ability to support the child.[18]

Modern appellate decisions and section 6(d) of the UPA refuse to grant binding effect to such agreements, regardless of their terms, unless they have been approved by a court.[19] The language of the UPA seems to assume that the agreement should be approved at the time of its making, in conjunction with a pending lawsuit. However, some courts have construed similar language to allow the judge to determine the fairness and adequacy of the agreement at the point in time when the alleged father enters it as a defense to the paternity action. The court then may allow the defense if the agreement was fair.[20]

The rule has developed in a slightly different direction regarding the enforceability of the agreement against the alleged father. Even though an agreement may not bind the mother or child, most courts have found the support provisions of an agreement to be enforceable, assuming some form of consideration can be found in the agreement. Furthermore, courts have shown a willingness to stretch the definition of consideration a bit in order to allow the mother to collect arrearages that have accrued under an agreement providing for installment support payments. Consideration has been held to be sufficient where the mother agrees not to file a civil paternity action, agrees to allow the alleged father to exercise some visitation rights or some control over the way the child is raised, agrees to move away, or agrees to give the child the father's name.[21] Some cases hold that the moral duty of a father to support his offspring will suffice as consideration.[22] It also has been held that the child, as third party beneficiary of such an agreement, has standing to enforce his or her terms against the alleged father.[23] Thus, the IV-D attorney may find that he or she has the best of both worlds. The agreement may not bind the mother or child as to current or future support, and yet arrearages that have accrued under the agreement may be collectible by way of an action for breach of contract.

Unfortunately, there are at least two drawbacks. First, many of these agreements will be oral and therefore unenforceable where they call for acts or forbearance that cannot be performed within 1 year. The statute of frauds almost always will apply. The second problem is the language contained in the UPA, which is so broad as to appear to void any such agreement entered into without court approval, even as to the support obligation of the alleged father.[24] The agreement would still constitute an admission against interest, however.[25]

Assume that the agreement was fair and adequate when entered, that both parties have performed according to their respective promises, but that a modification appears to be necessary or equitable. Does a court have the authority to enter such a modification? The traditional answer was no, but, again, the law is changing. Many of the modern statutes grant an approved settlement the status of a judgment, indicating that the support provisions are modifiable to the same extent as any other support order.[35] Other statutes specifically provide that such an agreement is modifiable if the alleged father acknowledged his paternity as part of the agreement.[36] Even without specific statutory authority, it may be possible to convince a court that its failure to assume jurisdiction for such a purpose would violate the illegitimate child's right to equal protection vis-a-vis legitimate children. Most States refuse to allow the parents of legitimate children to enter into agreements for future support that purport to bind the courts. [See Chapters 5 and 7, supra.] As a last resort, it might be possible to couch the action in terms of a request for recision of an unconscionable contract, given the alleged father's usual advantage in bargaining position at the time such an agreement is entered into.

The most frequent contact a IV-D attorney will have with paternity settlements will be those made by the IV-D agency and passed on to the legal office for disposition, or those that he or she successfully negotiates. As pointed out above, the modern statutes generally require that such settlements be court approved, and the Social Security Act probably requires a judgment of some sort. Exhibits 10.1 and 10.2 are included in the appendix to this chapter as suggestions.

Exhibit 10.1 is an Entry of Appearance/Waiver of Service of Process document that the alleged father can execute while he is in the office, whether negotiation is successful or not, in order to avoid the expense and inconvenience to both parties involved in personal service. Exhibit 10.2 is the Agreement and Consent to Judgment form, which is submitted to the court for approval along with a judgment form. The Agreement form contains a specific statement of rights that the alleged father is waiving as a result of the agreement. This list of waiver statements has been added in order to comply with the decision in the case of County of Ventura v. Castro, 93 Cal.App.3d 462, 156 Cal.Rptr. 66 (Dist.Ct.App. 1979), which held that an alleged father in a IV-D paternity case has a right to be informed of his statutory and constitutional rights prior to being asked to waive them. Any purported waiver made without such notice was held not to be "knowing and voluntary," and any judgment entered pursuant to such agreement could be voided on due process grounds. Clearly, drafting such agreements and conducting settlement negotiations with alleged fathers who are not represented by counsel requires great care.

PLEADING THE ACTION

In most jurisdictions, the modern paternity act provides for a civil action. With the exception of the rights afforded indigent paternity defendants to appointed counsel and

State-financed blood tests, the action proceeds like any other civil action. The proceeding is initiated with a petition or civil complaint instead of an indictment or criminal information. The purpose of the action is to determine the legal status of the parent-child relationship and not to seek societal retribution against the alleged father. In many jurisdictions, the language of the current statute carries criminal connotations, but the courts "endeavor to ascertain the true intention of the legislature, and give it effect, rather than carry out literally the terms employed." [10 AmJur2d Bastards Sec. 75 (1963); Com. ex rel. Miller v. Dillworth, 204 Pa.Super. 420, 205 A2d III (1964).] Service of process generally is accomplished upon a civil summons pursuant to State civil service of process statutes and rules, although some of the older statutes still provide for use of a warrant upon which the defendant is arrested, even though the resulting action may be conducted as a civil action.[28]

Burden of Proof

The burden of proof required by the statute generally follows the form of the proceeding. Modern statutes, including the UPA, clearly assume or specifically provide that the action is civil adopt the normal civil burden of proof, preponderance of the evidence. [Roods v. Roods, 645 P2d 640 (Utah 1982); Isaacson v. Obendorf, 581 P2d 350 (Idaho 1978); Doe v. Roe 647 P2d 305 (Hawaii App. 1982).] In Missouri, a State with no specific statutory procedure for determining paternity, it has likewise been held that the applicable burden of proof is preponderance of the evidence. [L.D. v. J.D., 481 SW2d 17 (Mo.App. 1972).]

Several States have opted for a middle ground, either by statute[29] or court decision[30] and have adopted the "clear and convincing evidence" standard. This standard requires evidence which exceeds a mere preponderance but does not require proof beyond a reasonable doubt. At least two States, both of which have very criminal-looking statutes, apply the reasonable doubt burden of proof rule.[31] If any trend is discernable, it is toward the adoption of the civil burden, as a result of the gradual enactment of the UPA by the States.

Parties

Under the UPA, section 9, the child, the natural mother, all presumptive fathers as established by section 4 of the Act, and all alleged fathers who are within the jurisdiction are necessary parties. This section has been held to be jurisdictional. [Matter of Burley, 658 P2d 8 (Wash.App. 1983); Perez v. Department of Health, 71 Cal.App.3d 923, 138 Cal.Rptr. 32 (1977).] In addition, all alleged fathers outside the jurisdiction of the court must be given notice of the proceeding and an opportunity to appear. The UPA grants all these parties standing to bring the action as well. In addition, "any interested party" may bring an action where a presumption arises because the alleged father has held the child out to the community as his, or has filed a written acknowledgment of paternity with the proper State or local agency. Where no presumption arises under the Act, the the State agency that is named in the statute also may bring the action.

The Uniform Act on Paternity, section 2, contains similar standing provisions, allowing the suit to be commenced by the child, the natural mother, or the public authority chargeable by law with supporting the child. If paternity has been acknowledged, or otherwise determined by law, the list is expanded to include any third party who has provided support to the child.

Courts in at least two States that have yet to adopt one of the uniform acts have dealt with the issue. In S. v. S., 595 SW2d 357 (Mo.App. 1980), the Missouri Court of Appeals, Western District, held that the child is a necessary party to any action in which paternity becomes a contested issue, and that a guardian ad litem must be appointed to represent the child's interests. The court stressed the need to avoid conflicts of interest between parents and child, to protect the integrity of the fact-finding process which too easily can be subverted by collusive suits, and to promote judicial efficiency. Allowing a suit to reach a judgment that is not binding on the child because the child is not made a party promotes duplicitous lawsuits, and is therefore an inefficient use of the judiciary, as well as being potentially unfair to the alleged father, according to the opinion. Conversely, an appellate court in the State of New York has held that the child is not a necessary party to a paternity action brought by the IV-D agency. [Commissioner of Social Services v. Bailey, 79 App.Div.2d 572, 424 NYS2d 24 (1st Dept. 1980).]

Some of the older statutes, which tend to be criminal or quasi-criminal in nature, limit the bringing of the action to the local prosecuting attorney, who brings the action on behalf of the county or the State. Under such a statute, neither the child nor the mother are technically parties to the action. The mother acts more in the nature of a complaining witness, and the child is an incidental beneficiary of the action. For an example of this type of statute and its effect on the standing of the parties, see State ex rel. Barton v. Veley, 651 P2d 683 (Okla. 1982). The Oklahoma statute was held to prohibit an action brought on behalf of the mother by a private attorney, although it was construed to allow the addition of the mother as a party in order to allow for her representation by counsel other than the prosecutor, but only after the prosecutor files the action.

Few appellate decisions discuss the party issue in the IV-D context, but the cases which do exist are very interesting. Two cases stand for the proposition that IV-D paternity cases are brought by the State on behalf of the child and that the proper nominal plaintiff is the child not the custodial parent. [State ex rel. Warren v. Mahan, 329 NW2d 673 (Iowa 1983); State ex rel. Adult and Family Services Division v. Bradley, 666 P2d 249 (Ore. 1983).] The latter case further held that since the State is asserting the rights of the child, the State can raise any issue which could be raised by the child.

Perhaps the most interesting line of cases is from the State of Washington, where the courts have discussed the proper procedure for adding the child to the action as party plaintiff. Section 9 of the UPA requires that the child be a party to the action, and that a guardian ad litem be appointed to represent the child's interests. The Act presumes that the interests of the parents and the child are too divergent to allow either of them to represent the child.

Requiring the action to be brought in the name of the child and the appointment of a guardian ad litem creates a procedural problem. Normally, the natural mother acts as "next friend" to the child and files the action on the child's behalf. After the action is commenced, and it is clear that the alleged father intends to contest paternity, the court appoints the guardian. Two Washington cases agree that the Act prohibits the natural mother from representing the child even for the limited purpose of filing the action, and further appear to hold that the child must be served (either personally or through the guardian ad litem) with the initial process before the court obtains jurisdiction. [State v. Douty, 92 Wash. 930, 603 P2d 373 (1979); Hayward v. Hansen, 97 Wash. 614, 647 P2d 1030 (1982).] To handle this problem, someone other than the natural mother could act as next friend for the limited purpose of filing the petition; then the court could enter an immediate ex parte order appointing the guardian, who can accept service of process on behalf of the child. Washington chose to pursue an even more fundamental solution by amending the statute to allow the IV-D agency to bring the action without naming the child as a party.

Guardians *Ad Litem*

As noted above, there is a discernable trend toward requiring the addition of the child as party-plaintiff and the appointment of a guardian *ad litem* to represent the child's interests. Unfortunately, there is some confusion about the proper function of the guardian *ad litem*. The UPA does little to lessen the confusion; it merely states that the child may be represented by its "general guardian or a guardian *ad litem*" without any guidance concerning the responsibilities which attach to the office.

A court generally appoints a guardian *ad litem* to represent the interests of infant *defendants*, whereas a "next friend" normally functions in a corresponding capacity for infant *plaintiffs*. However, a next friend's function generally is limited to acting as nominal plaintiff to avoid the legal incapacity suffered by the child as a result of his minority. A guardian *ad litem* has considerably more extensive duties, and is generally representing the child in a legal capacity and as an officer of the court. [See *Veazey v. Veazey*, 560 P2d 382 (Alaska I977).] As a result, the list from which most courts select guardians *ad litem* often is composed exclusively of attorneys, who convert the paternity trial into a three-party lawsuit. If the guardian *ad litem* takes his or her responsibilty seriously, he or she should be actively involved in discovery, pretrial negotiations, and the trial itself, including appeals. It is difficult to reconcile this concept of the function of the guardian *ad litem* with the practice in some States of appointing the IV-D agency as next friend or guardian *ad litem*. Clearly, the interests of the IV-D agency can diverge from those of the child to the same extent as the natural mother's.

In States that require a guardian *ad litem*, the appointment generally is accomplished by filing a motion with the court. The appointment is by *ex parte* order of the court. Exhibits 10.3 and 10.4 are samples of the motion and order.

The Petition

Although legal requirements vary from one jurisdiction to the next, the following information is recommended for inclusion in a petition for declaration of paternity, support, and custody:[32]

Count I: Declaration of Paternity

- Names of plaintiffs--choose among the child, next friend of child, natural mother, and State or local political subdivision, as appropriate
- Names of defendants--all alleged fathers and the natural mother's husband if the child was conceived or born during the marriage
- Allegation that the next friend listed in the caption has consented to serve and is bringing the action on behalf of the child
- Allegation of mother-child relationship
- Allegation that the child was or will be born out of wedlock

- Allegation that the defendant, or one of the defendants, is the father of the child and that the conception occurred within the State, if applicable
- Allegation that the defendant has held the child out to the community as his own and/or that the defendant consented to the addition of defendant's name to the child's birth certificate, if applicable
- Allegation that during the 6 months next preceding the date of the petition, the child has resided with the mother or other custodian at an address within the State [Uniform Child Custody Jurisdiction Act (UCCJA) requirement]
- Allegation that none of the plaintiffs have participated in any capacity in any other custody proceedings regarding the child in this or any other State (UCCJA requirement)
- Allegation that plaintiffs have no knowledge of other custody proceedings presently pending in this or any other State concerning the child (UCCJA requirement)
- Allegation that none of the plaintiffs are aware of any other person not a party to the proceeding who has physical custody or claims to have custody or visitation rights with the child (UCCJA requirement)
- Prayer for an order from the court declaring defendant to be in fact the father of the child.

Count II: Support and Custody

- Statement realleging and incorporating by reference the allegations of Count I
- Allegation that plaintiff mother has incurred costs in the mount of $_____ for the birth and maintenance of the child (for period prior to receipt of AFDC, if applicable)
- An allegation that plaintiff mother has incurred expenses in the amount of $_____ the prenatal care of the child (again, for the period prior to receipt of public assistance, if applicable)
- Allegation that the plaintiff mother is without adequate funds to care for and maintain the child individually
- Allegation that the plaintiff child is without adequate funds to support itself
- Allegation that the defendant has failed to provide support for the child and that he has the ability to do so
- Allegation that $_____ per _____ is necessary for the child's support
- Allegation that the child is presently residing in the custody of the plaintiff mother and that it is in the child's best interests to continue in her custody

- Prayer for an order of the court which requires defendant to pay to ___________, as and for the support of the child, $_____ per ___, and $_____ as reimbursement for lying-in expenses and support provided in the past, and for an order granting custody to the plaintiff mother.

Count III: Reimbursement to Political Subdivision

- Statement realleging and incorporating by reference the allegations contained in Counts I and II
- Allegation that the political subdivision has provided $____ in necessary support for the child
- Allegation that at all times the political subdivision expected reimbursement for sums provided to the child as necessary support
- Prayer for an order of the court requiring defendant to pay $____ to the political subdivision for reimbursement of sums it has expended for the necessary support of the child.

Exhibit 10.5 is a form petition containing all of the above components. It may be preferable to delete the custody claim, which may or may not eliminate the need to include the four UCCJA allegations in Count I. In many States the court is under a duty to make a custody determination whenever a child comes under its jurisdiction in a support proceeding, even if the custody order must be entered on the court's own motion. If that is the case, or if there is a strong line of case law which holds that custody of a child born out of wedlock automatically vests in its mother, then it is no doubt better to avoid the custody issue in the petition.

Criminal Paternity Actions

As a general rule, civil actions are vastly superior to criminal proceedings for establishing paternity due to the less cumbersome burden of proof, the availability of discovery, the existence of more flexible and long lasting enforcement remedies, and the use of more streamlined procedures in civil cases. Also civil judges may be more experienced with family law and therefore less apt to accept spurious defenses or allow interjection of irrelevant issues. Unfortunately, criminal statutes are the only alternative in some jurisdictions.

DISCOVERY AND PRETRIAL MOTION PRACTICE

Pretrial Hearing

The UPA[33] and many of the modern civil paternity statutes provide for a pretrial hearing. The purpose of the pretrial hearing is to inform the defendant of the nature and effect of the paternity proceeding and his due process rights, encourage negotiation and settlement, and provide some structure to the discovery process. The comment to section 10 of the Act states that the purpose is to minimize inconvenience and embarrassment to the parties in the vast majority of cases that will be resolved by consent as a result of blood test evidence.[34] The public is barred from attending the pretrial hearing.

At the pretrial hearing, the parties may present and cross-examine witnesses, make motions for blood tests, and present other evidence relevant to the paternity issue. On the basis of the information presented at the hearing, the judge or referee determines whether a judicial determination is in the best interests of the child, and makes a recommendation to the parties regarding settlement of the case. The Uniform Act specifically refers to the guardian ad litem's role in the settlement negotiations.

In Wisconsin, the availability for cross-examination of an adverse party provided by the pretrial hearing has been held to preclude the use of interrogatories in paternity actions. [State ex rel. Opelt v. Crisp, 81 Wis.2d 106, 260 NW2d 25 (1977).] The same logic would appear to apply to depositions, at least as to adverse parties and witnesses who are identified and available for cross-examination at the time of the pretrial hearing. Thus, the pretrial hearing can simplify the discovery process significantly and speed up the pretrial phase of the proceeding. Another Wisconsin case holds that the court is without authority to enter a blood test order prior to the preliminary hearing. [State ex rel. Scott v. Slocum, 109 Wis.2d 397, 326 NW2d 118 (App. 1982).] At least in Wisconsin, the preliminary hearing appears to be developing into the principle discovery mechanism. The blood test decision takes the concept one step further and recognizes that one of the purposes of the pretrial hearing is to provide the alleged father with an additional degree of protection, by requiring a "probable cause" determination by the court before the proceeding may continue.

Temporary Support

Some paternity statutes allow for the entry of a support order pendente lite.[35] The entry of such an order without some sort of probable cause hearing would appear to raise some due process problems. In States where the statute provides for it, the pretrial hearing is clearly the most appropriate forum for such a determination. A motion for support pendente lite is included in the appendix. [See Exhibit 10.6.] In States without statutory authority for the entry of a temporary support order, it might be possible to convince a court that it possesses inherent authority to make such a provision. A good analogy can be drawn between this situation and the remedy of the preliminary mandatory injunction. Assuming the court that is sitting in the case has some equity powers, the facts should support the requirements for an injunction, as follows:

- The plaintiff is likely to prevail on the merits (this would have to be established at the pretrial hearing or the hearing on the motion for temporary support)
- The plaintiff is likely to suffer irreparable injury should the order not issue (the theory being that there is no way for the child to exercise his or her right to paternal support after the fact)
- There exists no adequate remedy at law. (The counterargument here is that the reimbursement judgment, which the court is empowered to enter upon disposition of the suit, is adequate. From the child's point of view, this is clearly not the case. The child is going to have to do without the added support and permanently suffer to some degree or be forced to turn to public assistance.)

As additional ammunition for the argument, it can be noted that the legislature has provided for temporary support orders in dissolution proceedings. Any failure to provide a similar remedy for illegitimate children arguably constitutes a violation of the Equal Protection Clause unless the State can establish that the discrimination is related to a substantial and proper State interest. To be sure, the question of the alleged father's paternity constitutes a logically compelling reason to discriminate in this situation. The State has a valid interest in assuring that men are not forced to support children who may be adjudged to have been fathered by another man. However, alternative exists that is less restrictive than denying the illegitimate child the remedy. The "less restrictive alternative" is provided by the pretrial hearing procedure contained in the UPA and by the type of hearing that is afforded a defendant in the preliminary injunction situation. In Minnesota, if blood tests indicate a 92 percent likelihood of paternity the court, upon motion, will order temporary support. [Minn.Stat., sec. 257.62, subd. 5.]

A temporary order is extremely helpful in speeding up the proceeding because the alleged father no longer benefits from delay. Furthermore, experience has shown that even where a court enters a reimbursement judgment for the period during which a paternity case is pending, it is very difficult to collect such amounts from the father. It is also clear that saddling him with a several thousand dollar judgment may reduce significantly his ability to provide current support to the child. Adopting the "collect as you go" approach provided by temporary orders futhers both of the goals of the Child Support Enforcement Program. The State benefits from the alleged father's financial contributions during the pendency of the suit, which is likely to be a shorter time period than would be the case without the temporary order, and the child will benefit after the fact because the father will be able to devote a greater percentage of his income to current support.

Requests for Admissions

Federal Rule of Civil Procedure 36, which many States have used as a model in drafting State rules and statutes, provides that a party may serve upon any other party a written request that the other party admit the truth of any relevant matter set forth in such request or the genuineness of any relevant document described in and exhibited with the request.[36] The purpose of the request is to expedite the trial and relieve the parties of the cost of gathering evidence to prove facts that will not be contested at trial and that can be ascertained by reasonable inquiry.[37] The request may be served on the defendant, without leave of court, at any time after service of the summons and complaint.

The party on whom the request is served may file objections to the request, or an answer specifically admitting or denying the matters of which an admission is requested, or state in detail the reasons why he or she cannot truthfully admit or deny them. If he or she fails to respond, the matters set out in the request are deemed admitted. Where the party refuses to admit a matter contained in the request and the requesting party successfully proves the matter at trial, the court has the discretion to order that party to pay the reasonable expenses incurred in proving the matter.

Under the Federal Rule, the request need not be limited to peripheral facts, but may address matters which are genuine and hotly contested issues for trial, and may even relate to the "statements or opinions of fact or of the application of law to fact."[38] State or local discovery rules should be consulted to determine whether the Federal rule is in effect in a specific jurisdiction.

Clearly, the Request for Admission is a powerful and valuable discovery device and should be used in virtually every contested paternity case. In addition to expediting discovery and narrowing the issues for trial, the cost provision can authorize the court to assign the blood test and expert witness expenses to the alleged father, even in jurisdictions where there is no such authority in the paternity statute. In addition, by using the device, the child support enforcement attorney informs opposing counsel that he or she is serious about taking the case to trial. In cases where the facts are favorable, opposing councel can be given a feel for the strength of the State's case. Both of these items can improve significantly the likelihood of a settlement.

A form Request for Admissions is provided in the appendix to this chapter. [See Exhibit 10.7.] The following matters are typically appropriate for inclusion in a request served on a defendant in a paternity action:

- Jurisdictional facts such as residence of the parties, lack of previous legal action to determine paternity and custody of the child
- Written acknowledgments of paternity made by the alleged father, covering both authentication of the document and the alleged father's state of mind at the time he affixed his signature
- Oral acknowledgments of paternity by the alleged father
- Acts by the alleged father that are circumstantial evidence of his belief that the child is his
- Authenticity and admissibility of the birth certificate
- Fact and date of the child's birth
- Acceptibility in the scientific community of the validity and reliability of extended factor genetic paternity test results
- Authenticity of any stipulation regarding the taking of blood tests
- Chain of custody of blood samples to the paternity testing laboratory
- Human gestation period of 280 days
- Evidence that child was born after normal gestation period, if applicable
- Probable period of conception of child
- Occurrence of sexual intercourse between the mother and alleged father within the probable period of conception
- Financial information regarding the alleged father's ability to pay
- Authenticity of hospital and doctor bills that will form the basis of the claim for lying-in expenses
- Authenticity and admissibility of certified AFDC checks

- Authority of the legal representative of the IV-D agency to represent the child or custodial relative.

Once the alleged father makes an admission in response to the request, the matter is established conclusively, unless the court on motion permits him to withdraw the admission or amend it. [Federal Rule 36(b).]

Interrogatories

Federal Rule 33 provides for written interrogatories, a procedure by which a party may require another party to give written answers under oath to written questions concerning relevant subject matter.[39] Again, most State court rules regarding interrogatories are based on the Federal Rule. Like Requests for Admissions, interrogatories may be served on any party at any time after service of process without leave of court. In many jurisdictions, a set of interrogatories may be served with the initial pleading. Time limits for filing answers vary from one jurisdiction to the next. Local rules should be consulted.

There are definite advantages and disadvantages inherent in the use of interrogatories in paternity cases. The principal advantage is that they are inexpensive, and from the propounders point of view, do not take an inordinate amount of time to prepare. A set of stock questions can be drafted for potential use in any paternity case and then carefully tailored to each individual case. A sample set is provided in the appendix to this chapter. [See Exhibit 10.8.] Interrogatories are most useful in obtaining facts, as opposed to opinions, but should not be used to inquire about crucial, potentially case-dispositive matters. For example, avoid questions calling for specific answers concerning the acts of sexual intercourse that allegedly occurred between the mother and the alleged father. By asking such questions by way of interrogatory, the child support enforcement attorney gives the opposing counsel an opportunity to anticipate his or her line of attack and prepare the alleged father for those same questions at trial.[40]

The major disadvantage of interrogatories is that the opposing party has an opportunity to peruse the entire set of questions before answering any of them individually. The alleged father has the advantage of carefully thinking through each of his answers before committing himself, and the propounder has no opportunity to challenge evasive answers with additional questions. Thus, it is relatively easy for the alleged father to equivocate. Interrogatories that deal with hotly contested issues may do more to help the alleged father's attorney than they do to obtain useful information.[41]

There are some very effective uses of interrogatories, however. They can be used to narrow essentially uncontested issues in a fashion similar to requests for admissions. More importantly, they can provide information regarding the financial situation of the alleged father for use in setting the amount of the child support obligation and in future enforcement attempts. Interrogatories are a good method of forcing the alleged father to commit to defenses he will use at trial and to identify potential witnesses and their probable testimony. Because the answers to these types of questions require the other side to commit to a defense early in the proceeding and specify facts to back that defense up, the serving of interrogatories with the paternity complaint forces the alleged father's attorney to attend to the case with dispatch. In addition to providing valuable information, the early use of interrogatories thus speeds up the progression of the suit.

It is possible in some jurisdictions to use the interrogatory as an informal request for the production of documents. A request for a document which is related to the interrogatory is probably not enforceable in most States. However, many attorneys will comply with a polite request within the interrogatory, knowing that a Motion for Production of Documents will follow a refusal to provide whatever is requested. This is a good method of obtaining copies of pay stubs and tax returns.

One other important point to consider is that a party is under a duty to supplement an interrogatory response at any time after the answers are filed and before trial, if:

- The response dealt with persons who have knowledge related to discoverable information or who are to be called as witnesses at trial, and additional persons or witnesses have been identified.
- The response, though true when made, is no longer true or no longer believed to be truly the respondent's.

If a party fails to comply with the duty to supplement, the court may refuse to allow an unnamed witness to testify, grant a continuance or new trial, or grant other relief that it deems just.[42]

Depositions

The model rule authorizing the use of depositions is Federal Rule 30. Depositions are the only discovery device that can be used against persons who are not parties to the lawsuit and that allow for face-to-face examination and cross-examination by counsel. As a result, they are the most powerful and important of the five major discovery devices. Unfortunately, they are also by far the most expensive. Normally, a plaintiff must obtain leave of court in order to take depositions prior to the expiration of the answer period. Otherwise they may be taken without leave at any time, upon simple notice to the opposing party and after service of subpoena on a nonparty deponent. Documents may be inspected by including a request for production of documents in the notice of deposition or by converting the subpoena into a subpoena duces tecum.[43]

While it is generally possible to have the deponent sworn in by any unbiased person who is authorized to give oaths and to have the deposition taped and later transcribed, it is preferable to use the services of a court reporter. A court reporter adds dignity to the proceedings and credibility to the transcript in case a dispute arises later as to what was actually said.[44] Either way, the deposition is transcribed and submitted to the witness for inspection and signature and then filed with the court. The questioning of the deponent follows the style of testimony during a lawsuit, except that the scope of permissible questions is broader and there is no judge on hand to rule on objections. The reporter notes objections which are ruled on when the question and answer are offered as evidence at trial. The witness must answer the question after the objection is noted with few exceptions.

Exhibit 10.9 (in the appendix to this chapter) is a trial outline form that contains a section on cross-examination of the alleged father at trial. This outline also provides a good skeleton for preparing deposition questions. Prior to getting to in-depth questions such as those contained in the trial outline, it is a good idea to ask a series of short, nonthreatening questions to establish rapport with the alleged father. Questions dealing with his personal background and financial situation serve this function. It is also a good strategy to explore hobbies and leisure activities to obtain possible leads for witnesses. The simple checklist to follow in taking depositions is "who, what, when, where, why, and how. If you ask each of these questions and follow through, you will have taken a complete deposition."[45]

One rule worth noting is that an attorney never should depose his or her own witnesses unless it is absolutely necessary in order to preserve their testimony for use at trial. Likewise, an attorney should never ask his or her witnesses questions when they are being deposed by the other party. Such a tactic only aids the preparation of the other side's case or, worse, helps a friendly witness dig himself or herself a deeper hole. Any answer that the witness could give at the deposition can be given at trial, with the advantage of extra time to pose the question and think through the response.

It goes without saying that witnesses should be prepared for a deposition to the same extent as for trial. A good list of instructions for a witness can be found in Spivey's Manual for the Trial of Contested Paternity Proceedings, cited above.

In addition to oral depositions, most court rules allow for depositions on written questions. The IV-D paternity case may present an exception to the general rule that there is rarely a valid use for depositions on written questions. Blood test results are difficult to get into evidence without a foundation of expert testimony. Experts are extremely expensive as live witnesses, and since many tests are conducted in regional laboratories far from the site where the blood was drawn and the trial is to take place, the cost of transporting the expert to the courtroom can be prohibitive. Deposing the expert with written questions solves this problem. The procedure can be cumbersome and time consuming. However, once an attorney has done it, the questions will have been drafted and the procedure learned, and the second through nth time will be relatively painless. The major drawback of written depositions is that the questions and answers must be read to the judge or jury. Again, however, there is an alternative. Many States now use videotaped depositions. Such a videotape could be prepared once and then reused an infinite number of times, assuming it is possible or desireable to use the same laboratory for future testing.

Requests for Production of Documents

Federal Rule 34 has become the model rule on "requests for production of documents and things and entry upon land for inspection and other purposes." Paternity litigation rarely requires this discovery device. As noted above, copies of documents regarding the financial condition of the alleged father normally can be obtained with a simple request contained in an interrogatory. Copies of expert witness reports generally will be provided without the necessity of a the formal request. Nevertheless, it is good to understand the device. Remember that it applies only to other parties to the suit; documents from nonparties must be obtained by way of subpoena duces tecum.

The procedure as to parties is simple and does not require the participation of the court. The requesting party simply serves the request on the party in possession of the document, describing the document with reasonable particularity, and specifying a reasonable time, place, and manner for making the inspection.[46] The party in possession of the document must respond within the applicable time period either objecting to the inspection or stating that inspection will be permitted as per the request. The inspection allowed for by the rule includes copying, photographing, drawing, or other forms of data compilation, and extends to all discoverable material under the "control" of the party.[47] Older versions of the rule require a showing of "good cause" as support for the request where the party in possession challenges the inspection. Although newer versions of the rule have dropped this requirement, it is perhaps a good idea to set forth the cause in the request itself. In jurisdictions where the new rule, or informal practice, has negated the good cause requirement, this portion of the request may be omitted. [See Exhibit 10.10.]

Motions for Physical and Mental Examinations

Genetic paternity testing is the most powerful form of discovery available for contested paternity cases. The results often lead to a negotiated settlement or dismissal. In most cases, the testing can be arranged for and conducted without the need of a court hearing. A sample stipulation for this purpose is contained in the Appendix to this chapter. [See Exhibit 10.11.] When such a stipulation cannot be obtained, it is necessary to move the court for an order directing the parties to submit to testing. [See Exhibits 10.12 and 10.13.]

Most paternity statutes contain specific authority for the entry of an order requiring the parties to submit to blood tests. Without such specific statutory authority, the usual method of authorization is the civil discovery rule allowing for physical and mental examinations. The model rule here is Federal Rule of Civil Procedure 35. In addition to blood tests, physical examinations are occasionally necessary to confirm the existence of identifying birthmarks or moles on the alleged father's body to prove intimacy between the parties. Insanity is not a defense to a paternity action, even under a criminal statute, so mental examinations are not relevant.[48]

The Federal Rule applies only to parties to the action and persons under their custody or legal control. The latter requirement clearly was drafted to include a nonparty child in a paternity case. Note that under this rule "other men" must be joined as third party defendants before the court is authorized to order them to submit to testing. Such joinder may not be necessary under the more specific provisions contained in modern civil paternity statutes.

Orders directing a party to submit to a physical exam are available only upon "good cause shown" under the Federal rule. Given the publicity scientific paternity testing has received in recent years and the fact that many of the newer statutes require them to be administered in every paternity case, the good cause requirement should not pose a problem. However, it may come up in the "birthmark search" situation. If the alleged father objects to the inspection of his body, it will be necessary to inform the court and, indirectly, the alleged father of the precise target of the inquiry. Opposing counsel generally will offer to admit the existence of the birthmark rather than allow the result of the physical examination to be emphasized at trial with live testimony.

Regarding experts, the court apparently has some discretion to refuse to appoint the expert or laboratory suggested by the movant and appoint in lieu thereof an expert or laboratory of its own choosing.[49] Normally, judges seem most comfortable dealing with the same expert witness time after time. Once a witness is found who pleases the court, subsequent motions should call for the blood samples to be submitted to the favored laboratory. Prior to establishing such a precedent, it is a good idea to allow the alleged father to select the laboratory, or choose from among a list that meets the State or county's budget constraints. This lessens the chance of a challenge and increases the likelihood of a negotiated settlement, because the alleged father will have a higher degree of confidence in the test results.

The party on whom the examination is performed has an absolute right to receive, on request, a copy of the resulting report, but by accepting a copy he waives his privilege to withhold past or future examination reports regarding the same physical condition.[50]

Occasionally, an alleged father will challenge the constitutionality of the order to submit to blood testing. These challenges may include the following: the alleged father's right to privacy is being unlawfully abridged; the blood drawing constitutes an unreasonable search and seizure; allowing the test to be performed on an alleged father whose religious beliefs prohibit the drawing of blood violates his First Amendment rights; the testing unlawfully requires the alleged father to incriminate himself in violation of the Fifth Amendment. All of these arguments have been rejected.[51]

However, these decisions do not go so far as to establish that blood may be drawn over the objection of an alleged father who refuses to volunteer a vein. A number of decisions in criminal cases uphold the drawing of blood from a nonconsenting defendant. [Schmerber v. California, 384 US 757, 86 SCt 1826, 16 LEd2d 908 (1966).] Because constitutional limitations are given more weight in criminal cases than in civil cases, it is probable that a similar holding would result for paternity testing. The author is aware of no statutes which specifically provide for involuntary blood drawing, however. There are remedies if an alleged father simply refuses to comply with the blood test order.

Some of the modern statutes provide for enforcement by civil contempt; a sanction which no doubt would be effective. In most other States, the situation is bleak. The court may apply normal discovery sanctions, at least in Federal Rule States, after the disobedient party has refused to comply with an Order to Compel Discovery. Applicable sanctions in paternity cases include:

- An order of the court "establishing" the matters to which the discovery order applied in accordance with the claim of the party who obtained the order

- An order refusing to allow the disobedient party to support or oppose designated claims, or prohibiting him from introducing designated matters in evidence. (Clearly, the alleged father would not attempt to introduce his own test results, and it is difficult to conceive of a way the court could tailor a sanction that logically would relate to the disobedience.)

- An order striking pleadings, staying the proceedings until the order is obeyed, dismissing the action, or rendering a default judgment against the disobedient party. (The first three are effective against plaintiffs only, and the default option is perhaps too severe, given the fundamental interests of the alleged father and the child in an accurate determination of paternity. [See County of Hennepin Ct. rel. Barthow v. Brinkman, --- NW2d ---, 11 FLR 1274 [Minn.App.1985].)

- An order treating the failure as contempt of court, except as to orders to submit to a physical or mental examination. (Here the rule itself contains the bad news.)

Clearly, legislation offers the best solution to the problem of alleged fathers who refuse to submit to testing. In the mean time, every attorney in the Program needs to be thinking of an appropriate sanction to suggest to the court should the issue ever arise. There is a Minnesota decision which holds that an alleged father's refusal to undergo paternity testing may be brought out at trial to create an inference unfavorable to his defense of nonpaternity. [State on behalf of Orloff v. Hanson, 277 NW2d 205 (Minn. 1979).]

Motions in Limine

In jury trials, defense counsel often will try to place doubt in jurors' minds by referring to matters that are highly prejudicial but that are clearly irrelevant or otherwise inadmissible. As one common tactic, defense counsel inquires of every plaintiff's witness, "Do you know John Doe?" without ever identifying John Doe or explaining his relevance to the case. Plaintiff's counsel no doubt could get an objection sustained to halt the tactic but at the sizable cost of appearing to the jury to be hiding the existence of "another man."

To ward off such a tactic, an attorney may file a Motion in Limine, asking the court to enter a pretrial order prohibiting defense counsel from seeking to admit evidence of inadmissible and prejudicial subject matter. Exhibit 10.14 is a form Motion in Limine. In addition to nonspecific references to other men, it is wise to include in the Motion any other type of inadmissible evidence which might be prejudicial where appropriate to the facts of the case such as:

- References to other illegitimate children born to the mother
- References to contraceptives used, or not used, by the mother before, during, or after the probable period of conception
- References to the marital status of the mother's parents
- References to the mother's reputation in the community for sexual promiscuity
- References to abortions had, or allegedly had, by the mother
- References to sexual encounters between the mother and other men outside the probable period of conception.

In addition to the above, the IV-D attorney should study the file and all discovery documents looking for other areas ripe for such defense tactics. It might be wise as well to consult with any other available attorneys who have tried a case against the opposing counsel. Their experience may provide clues as to the opposing counsel's style and identify additional subject matter for inclusion in the Motion. It is also a good idea to prepare a brief in support of the Motion. Judges who are not experienced in conducting paternity trials are often willing to allow defense counsel to delve into sensitive areas which properly should be excluded.

A Motion in Limine achieves six interrelated objectives as follows:

- Isolating prejudicial evidence from the jury [Bridges v. Richardson, 163 Tex. 292, 354 SW2d 366 (1962); Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal.App.2d 60, 29 Cal.Rptr. 847 (1968)]
- Discovering the opponents' case, or theory, as to the admissibility of the contested evidence

- Forcing election by opponent (often, in response to the motion, opposing counsel will argue that evidence is admissible, but only for a limited purpose--one that is often neither prejudicial to the plaintiff nor useful to the defendant)

- Preserving record on appeal [Montgomery v. Vizant, 297 SW2d 350 (Tex.Civ.App. 1957)]

- Obtaining favorable settlement offer

- Simplifying the trial.[52]

There are also some drawbacks to using Motions in Limine. It may be difficult for the court to assess the exact context in which the issue might come up at trial. If so, the judge may be unwilling to enter an order at that point enjoining defense counsel from referring to the evidence at trial. Should this happen, defense counsel will believe he or she has a license from the court to refer to the evidence in the presence of the jury. Worse, he or she might not have thought to use the evidence had the Motion in Limine not been filed. For these reasons, items should not be included in the Motion unless it is clear the judge will grant the Motion, and the issue is likely to be interjected by the defense.

For an excellent discussion of the history and use of the Motion in Limine, see 20 AmJurTrials 444.

PATERNITY TRIALS

After discovery is completed and all pretrial motions have been resolved, the matter may proceed to trial. The first trial task is jury selection. First, the prospective jurors are seated in the jury box, or perhaps in a room set aside specifically for jury selection. Then, counsel for both parties have the opportunity to question them concerning their attitudes, opinions, and prejudices. This process is known as voir dire from the French voire (truly) and dire (to say).[53]

While, the process of jury selection is an art not easily taught, the importance of the process should not be underemphasized. An in-depth treatment of voir dire is beyond the scope of this Handbook. Nevertheless, a brief discussion of the process appears below, and a set of sample questions is included as Exhibit 10.15. Experience is an essential ingredient in successful jury selection, so one good technique is to find a mentor with a number of jury trials to his or her credit and benefit from his or her experience. Another good suggestion is to watch learned members of the local bar in action.

In many States, both the court and the attorneys take an active part in the jury selection process. Either the court or counsel will query potential jurors as to their occupations, spouses' occupations, residences, prior juror experiences, acquaintance with the attorneys or their law firms, acquaintance with parties and witnesses, and knowledge of the subject matter of the suit. After eliciting this general information counsel will ask questions to discover information that would allow potential jurors to be challenged "for cause" or to select those jurors who will be excused as one of the "peremptory challenges." California law is typical in allowing each side to the suit six peremptory challenges.[54]

Challenges for cause generally come during the questioning process, because the cause arises from a juror's answer to a specific question. The attorney must take great care to carry out the challenge without offending the challenged panel member. Insensitivity to the panel member's feelings can have a chilling effect on subsequent jurors and prejudice the members who end up on the jury against the offending counsel. Peremptory challenges are made after both sides have finished questioning the panel and have "passed for cause." After compiling a list of candidates for peremptory strikes, start at the top of the panel and strike downward on the list. Names toward the end of the list, especially if the panel is a large one, are less likely to end up on the jury.[55]

In deciding who among the panel members should not be challenged, follow the rule of identity. Choose people who will identify most closely with the mother, the State's interest, and the child. It may be necessary to take into account racial, religious, social, and economic factors. Avoid macho-looking young men and middle-aged persons of both sexes who have no children. Favor single parents and people whose answers exhibit kindness, understanding, and compassion, on the theory that they will keep the best interests of the child uppermost in their minds.[56]

Nonscientific Evidence

Once pretrial motions and proceedings are complete and the jury is selected, the paternity case is ready for trial. In both jury and bench trials, both attorneys normally make an opening statement, to present a persuasive summary of their client's allegations and to tie them, generally or specifically, to the forthcoming evidence. Some jurisdictions limit the opening statement to a general outline or summary of the allegations. Others permit, or even require, a detailed presentation of the evidence that the attorney expects to prove by each witness. Trial attorneys disagree over which tactic is more desirable. For a discussion of the pros and cons of both approaches see Keeton, R., Trial Tactics and Methods, sec. 7.11 (Little, Brown and Company: Boston, 1973).

This section discusses the types of nonscientific evidence that State courts and legislatures have determined to be legally relevant in paternity proceedings. The following section discusses the admissibility of scientific paternity testing results and the proper way of laying a foundation for their introduction at trial.

Uniform Acts. Both the UPA and the UAP contain specific sections on the types of evidence which are admissible in a paternity action. Section 12 of the UPA provides that all evidence relevant to the paternity of the child is admissible, and further sets out four categories of evidence which are specifically admissible, as follows:

- Evidence of sexual intercourse between the mother and alleged father at any possible time of conception
- An expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy
- Blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity
- Medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts.[57]

Section 14 contains two limitations concerning the admissibility of evidence regarding the mother's sexual activity. Testimony relating to sexual access to the mother by an unidentified man at any time, or by an identified man at a time other than the probable time of conception of the child, is inadmissible unless offered by the mother. Evidence offered by the alleged father relating to sexual intercourse between the mother and another man during the probable period of conception is admissible only if the other man has undergone blood tests and has not been excluded as a possible father of the child.[58] Only 10 States have enacted the UPA. However, the fact that the UPA contains these evidentiary limitations makes a very good argument for their application in States that have yet to adopt the Act, unless there is existing case law to the contrary or conflicting language in the State's paternity statute.

Mother's testimony standing alone. While there is some case law to the contrary, the overwhelming majority opinion is that the mother's uncorroborated testmony, if sufficiently credible, is sufficient to support a finding of paternity. [P.V. v. L.W., 93 N.M. 577, 603 P2d 316 (N.M.App. 1980); Dorsey v. English, 283 Md. 522, 390 A2d 1133 (1978); 10 Am.Jur.2d Bastards, sec. 110.] The issue of corroboration has found its way into the case law because many nineteenth and early twentieth century criminal bastardy statutes required corroboration of the mother's claim as a condition precedent to filing the complaint.

Clearly, it is not a good tactic to go to trial with only the testimony of the mother. Nevertheless, should all other forms of evidence be deemed inadmissible by the court, the lone testimony of the mother should defeat a defendant's motion for summary judgment.

Child's birth certificate. As a rule, the birth certificate is admitted by stipulation for the limited purpose of establishing the birth of the child and, perhaps, the birthweight. One Illinois decision holds that a certificate that indicates no father is probative that the child was born out of wedlock. [People ex rel. Ashford v. Ziemann, 61 Ill.Dec. 741, 110 Ill.App.3d 34, 441 NE2d 1255 (1982).] There is often a State statute which makes the certificate presumptive evidence of the birth of the child. [See, for example, Cal.Evid.Code, secs. 1281 and 1530.] Even without the statute, the certificate would seem to qualify as a business, official, or hospital record, so that no hearsay objection would be sustained as to the admissibility of the certificate to prove the medical circumstances surrounding the birth, once the proper foundation is laid.

The appearance on the certificate of the alleged father's name in the "child's father" space would seem to add another layer of hearsay that would not qualify for admission as a business or hospital record, unless his name was entered as a result of some sort of acknowledgment made by him, and entered by an employee of the hospital in the ordinary course of preparing the certificate. If the father's name or other identifying characteristics appear on the certificate as a result of the attestations of the mother, the statement is no doubt too self-serving to be of any probative value, except perhaps as a prior consistent statement.

The alleged father's name rarely will appear on the certificate, either because the mother was married to another man on the date the child was born or because the alleged father has refused to comply with an acknowledgment procedure mandated by statute. State law often requires the name of the mother's husband to be entered on the certificate, regardless of the true biological facts, and prohibits the listing of a father for illegitimate children prior to the entry of a judgment of paternity or statutory acknowledgment. Opposing counsel often will try to confuse the jury by making it appear as though the mother was unsure of the identity of the father at the time the certificate was prepared. Plaintiff's attorney should anticipate this problem and provide for it in his or her Motion in Limine, especially if he or she intends to offer the birth certificate as evidence.

Admissions of the alleged father. This is clearly one of the most powerful forms of evidence. Any acknowledgment by the alleged father of even the possibility of his paternity severely damages any of his potential defenses. Declarations of the alleged father are admissible over a hearsay objection as admissions[59] and can consist of oral or written statements or conduct that has a communicative effect.[60]

Evidence of acknowledgment may include:

- A statement by the alleged father, made after the mother becomes pregnant, that the child is his, including participation in the filling out of the birth certificate
- The alleged father's taking the mother to prenatal doctor's appointments
- The alleged father's taking the mother to the hospital and arranging for her admission
- The alleged father's visiting the mother and child at the hospital
- The alleged father's arranging for the discharge of the mother and child from the hospital and signing the necessary release forms
- The alleged father's bringing the mother or child into his home after discharge from the hospital
- The alleged father's displaying the child to others and holding the child out to the community as his
- The alleged father's providing for or making payments for the care, maintenance and support of the child[61]
- The alleged father's suggestion that the mother get an abortion upon learning that she is pregnant[62]
- The alleged father's silence when repeatedly confronted with the allegation that he is the father[63]
- The alleged father's filing of a tax return listing the child as a dependent[64]
- The alleged father's having cohabited with the mother during the entire gestation period[65]
- The alleged father's complicity in the child's use of his surname[66]
- The alleged father's presence at the child's baptism and failure to object to his name appearing on the baptismal certificate[67]

- The alleged father's visitation of the child after discharge from the hospital

- The alleged father's buying gifts for the child.

Prior declarations of the mother. Generally, prior statements of the mother are held to be inadmissible as self-serving and not probative. Under Federal Rule of Evidence 801(d)(1)(B), prior consistent statements are admissible only after a charge of recent fabrication has been made to impeach a witness's testimony. Some jurisdictions include declarations made by the mother during labor.[68] Some decisions have held that, because the defendant's denial of paternity challenges plaintiff's veracity, prior consistent declarations always are admissible. [*People ex rel. Ashford v. Ziemann*, *supra*.]

Testimony regarding sexual intercourse between the mother and the alleged father. Clearly, testimony of sexual intercourse between the parties during the probable period of conception is crucial to the petitioner's case. Live witnesses to the act are rare, so the mother generally will provide the testimony on direct examination during petitioner's portion of the trial. Circumstantial evidence is often available from friends and roommates who were aware that the two parties were sleeping together in the same room, or who witnessed the parties "together in equivocal circumstances such as would lead the guarded discretion of a reasonable and just man" to conclude that sexual intercourse had occurred between the parties.[69]

A related issue is the admissibility of evidence regarding sexual activity between the parties which occurred outside the probable period of conception. Such evidence can help establish the extent of the intimacy that existed between the parties and therefore the credibility to be assigned to both parties' testimony. The majority rule is that such evidence is admissible if the sexual activity is not too remote in time to support an inference that the intimacy continued into the conceptive period.[70] Opposing counsel often will challenge the admissibility of this evidence, especially if he or she is still smarting from an unfavorable ruling on a Motion *in Limine* regarding sexual activity between the mother and other men; it is advisable to have some authority on hand.

Defining the probable period of conception. It is necessary to define the probable period of conception for two reasons. First, the mother's testimony regarding her sexual activity with the alleged father must be given some biological relevance to the birth of the child. Second, a period of time must be established to limit the alleged father's evidence regarding the mother's sexual activity with other men.

As with most potentially disputable facts, it is best to handle this issue with a stipulation prior to trial. The extent to which this is possible naturally will depend on the the nature of the alleged father's defense, especially regarding the existence of other men. One common defense tactic is to make the mother appear confused as to the date of her last menstrual period. If the alleged father's attorney can shake her testimony on this issue, then her entire testimony becomes suspect, and evidence of her alleged activity with other men becomes easier to introduce. If the alleged father's attorney plans such a tactic, he or she may not agree on a stipulation.

In most States, the date of conception may be established by first adducing testimony as to the date of the child's birth, and then asking the court to take judicial notice of the normal gestation period of 280 days or 10 lunar months.[71] Actually, this period measures the normal passage of time from the beginning of the mother's last menstrual period to the birth of the child. The average gestation period is 267 days. (The legal literature often misquotes the medical literature.) Thus, the date of conception is computed by counting backwards from the date the child was born. The date of birth can be established by introduction of the birth certificate or with live testimony from the mother. It also has been held that the state of pregnancy is such a "common condition" that a woman may give her own opinion as to when she became pregnant. [Goody v. Pinto, 37 Conn.Super. 786, 436 A2d 1099 (1981).] A few States have enacted a statute that determines the probable date of conception, again counting back from the date of birth. [See Wis. Stat.Ann., sec. 891.395.] The Wisconsin statute creates a presumption that conception occurred within a span of time extending from 240 to 300 days before date of birth. To cause the presumption to arise, it must be proved that the child was a full-term baby, which in turn is established by showing that the birth weight exceeded 5 1/2 pounds.

Occasionally, the mother will claim to have had sexual intercourse with the alleged father and no one else but during a period that is slightly outside the presumptive period. When this occurs, an expert witness should give an opinion that gestation periods frequently vary from the norm and that the child in question was either premature or past-due. The party alleging an abnormal gestation period has the burden of proof on that issue.[72]

Physical resemblance between the child and the alleged father. Authorities are split regarding the admissibility of evidence offered to establish that the child and alleged father share similar physical characteristics. There are two popular methods of presenting such evidence. The simplest way is to place the alleged father next to the child, and allow the jury to "view" their similarities, without any reference to specific features. The specific demonstrative similarities can be emphasized with questions to the parties and during opening and closing argument. [See Commonwealth v. Kennedy, 383 Mass. 308, 450 NE2d 167 (1983); State v. Green, 284 SE2d 688 (N.C.App. 1981).] In States which allow exhibition of the child to the jury, a condition to the general rule sometimes states that the child must be old enough to have developed "settled features." The judge has considerable discretion regarding the determination of both this issue and the propriety of allowing the child to be exhibited for this purpose. [10 AmJur2d Bastards, sec. 120; 95 ALR 309 (1935).]

In some States, a live witness may testify that, in his or her opinion, the child resembles the alleged father or other members of his family. [10 AmJur2d Bastards, sec. 41.] Other States will not allow lay opinion testimony on the subject, but will allow expert testimony, once a proper foundation is laid to establish the witness as an expert and to establish that the testimony is based on accepted and reliable scientific principles. [State ex rel. Schehlein v. Davis, 54 Wis.2d 446, 193 NW2d 43 (1972); Almeida v. Correa, 51 Haw. 594, 465 P2d 564 (1970).] Without the foundation, such testimony is "inherently unsatisfactory." With the exception of cases where the child and alleged father share a physical characteristic for which a population distribution has been developed, it would appear impossible to lay a proper foundation. The expert could testify that the trait is transmitted genetically, but the expert's inability to report on how frequently the trait appears in the population as a whole would dilute the probative value of any expert opinion.

The practice adopted by many of the newer statutes, which require the addition of the child as a party to the action, would seem to end all prohibitions against the child being in the courtroom during the trial, and the availability of extended factor genetic paternity testing would seem to erase the need for using resemblance as evidence, except in very unusual cases (e.g., children who are biracial, have genetic abnormalities, or exhibit recessive traits).

Evidence of impotency or sterility. The recent popularity of vasectomies and the fact that credible evidence of impotency or sterility no doubt would be case-dispositive make it probable that this issue someday will be raised as a defense in a case brought by every IV-D agency that handles a high volume of paternity cases.

Fortunately, it is a difficult defense to prove. According to estimates, 90 percent of male impotency results from psychological factors.[73] Since the psychological impact of the problem can differ from one sexual partner to the next, an attorney can argue that testimony relating to the potency of the alleged father by persons other than the parties themselves is irrelevant and therefore inadmissible. Medical testimony regarding impotency caused by organic defects would be admissible, assuming the expert could testify that the defect was present at all times during the probable period of conception.

The situation with a sterility defense is similar. Very few men are absolutely sterile. In most men who are referred to as sterile, the defect relates to the number or quality of sperm, making it unlikely that conception will occur with most sexual partners. However, the extent of the defect often varies over time and affects fertility to a different extent from one partner to the next. Since it is impossible to recreate the conditions in vivo on the day the child was conceived, it can be argued that the results of fertility tests conducted for use at trial are inadmissible because the test conditions were not identical or similar to those which produced the conception.[74] This argument has prevailed in several reported decisions. [See, for instance, Houston v. Houston, 199 Misc 469, 99 NYS2d 199 (1950).]

Mother's sexual activity. Alleged fathers in paternity cases often try to argue that the mother's promiscuity casts doubt on her allegation. Generally, such evidence is inadmissible unless the sexual activity occurred within the probable period of conception. [Crain v. Crain, 662 P2d 538 (Idaho 1983); South Carolina Dept. of Social Services v. Thomas, 274 S.C. 228, 262 SE2d 415 (1980); Ramsey County v. S.M.F., 298 NW2d 40 (Minn. 1980); State ex rel. Gleason v. Gregg, 633 P2d 1322 (Ore.App. 1981); Uniform Parentage Act, sec. 14; Sass, "The Defense of Multiple Access (Exceptio Plurium Concubentium) in Paternity Suits: A Comparative Analysis," 51 Tulane L.Rev. 468 (1977).] In at least one State, such allegations must be corroborated in order to be admissible. [Moon v. Crawson, 441 NYS2d 227 (NY Fam.Ct. 1981).]

Older cases stand for the proposition that such evidence may be admissible for the limited purpose of impeaching the testimony of the mother. [10 AmJur2d Bastards, sec. 116.] This rule still applies where the mother makes a claim of "prior chastity" on direct examination.

Contraceptive fraud. One issue that has received recent attention in the press and in appellate decisions is contraceptive fraud. In asserting this defense, alleged fathers will admit having had a sexual relationship with the mother but will deny legal responsibility for the conception, pregnancy, and birth of the child by alleging that the mother fraudently claimed that she was using contraceptive devices and thus could not become pregnant as a result of the sexual union. The defense has been effective in at least one trial court. [In re Pamela P., 7 FLR 2784 (NYFam.Ct. 1981).] However, appellate courts, including the courts in New York, uniformly have held that such conduct by the mother, if proven, does not constitute a defense to a paternity action. [Stephen K. v. Roni L., 164 Cal. Rptr. 618 (1980); Hughes v. Hutt, 455 A2d 623, 9 FLR 2278 (Pa. 1983); Faske v. Bonanno, --- NW2d ---, 11 FLR 1100, (Mich.Ct.App. 1984); Pamela P. v. Frank S., 449 NE2d 713, 9 FLR 2462 (NYCt.App.1983).]

These decisions recognize that an individual has a constitutional right to decide in private whether or not to conceive a child. This right guarantees the individual freedom from intrusion by the State, at least where the State is attempting to limit the individual's freedom of choice. However, this constitutional right has not been held to prevent the State from imposing a parental obligation upon someone who participated in a conception without the intent to conceive. To do so would be tantamount to allowing the parents to determine, by agreement, the extent of the parental support obligation. Courts and legislatures have been unwilling to allow parents such control in other fact situations, and courts in the above cited decisions have refused to create an exception to the rule for the man who has been duped fraudulently or negligently into believing that conception was impossible.

Scientific Paternity Test Results

In the Child Support Enforcement Program, scientific paternity testing has proved a powerful inducement to settlement. Nevertheless, an occasional case with highly positive test results will go to trial. Prior to attempting to use test results as evidence at trial, the IV-D attorney must develop a functional knowledge of the testing procedures and a theoretical understanding of the genetic and statistical principles which underlie the tests and the way in which the results are presented by the laboratory. A treatment of these issues appears as Appendix B at the end of this Handbook.

This section treats the issue of admissibility. First, the reported case law regarding admissibility in general is identified and analyzed.[75] Next appears a discussion of the proper method of laying a foundation for introduction in evidence of the test results themselves.

Admissibility. The courts in the United States have been consistently slow to grant judicial acceptance of blood test evidence. The first reported decision in which blood analysis played a key role in a paternity dispute was Commonwealth v. Zammarelli in 1931. A new trial was granted in that case on the basis of test results showing that the defendant could not have fathered the child in question. Fifteen years later, however, the California Supreme Court still deemed similar evidence inconclusive. In a case which attracted national attention, a popular comedian was ordered to support an out-of-wedlock child, even though blood tests showed that he could not be the child's biological father.[76] Now, finally, blood tests excluding the possibility of paternity are accorded decisive evidentiary weight by all courts.[77]

The State of Iowa early recognized the principle of exclusion of the possibility of paternity based upon incompatibility of blood groups. "The uncontradicted testimony of the expert negativing paternity should be final. If it is doubted, other experts could take new tests until the facts of the blood content could be shown with accuracy. Then, where this was established, but one result would be possible scientifically, and for a court to hold the contrary seems absurdity." [25 Iowa L.R. 823, 825 (May, 1941).] Iowa also has been cited as one of the first States (perhaps the first State) to endorse, albeit tacitly, the principle that genetic similarity of the child's and the alleged father's blood may be used as affirmative evidence of paternity.[78] In the case of Livermore v. Livermore, 233 Iowa 1155, 11 NW2d (1943), both sides offered test evidence. On appeal, the defendant assigned as error the admission of expert testimony relating to the fact that he could not be excluded. The test results did not indicate a probability of paternity. The court found "no merit in the contention" that this evidence was improper, and judgment was affirmed. [Livermore, supra, at 393.]

The tests employed in *Livermore*, *supra*, only could have shown that the defendant was a member of a group of men with similar blood types, which included nearly half of the male population. The case does not specify which tests were employed, but the only systems commonly typed at the time were ABO, MNS, and Rh-Hr. If all of these tests had been performed, only about 53 percent of the random male population could have been excluded as possible fathers complete rule.[79] In fact, until very recently, the courts staunchly limited their acceptance of blood grouping evidence to the same three systems (ABO, MNS, and Rh-Hr) that were available 40 years ago when *Livermore* was decided. Together these tests give a wrongly accused "father" a slightly better than 50-50 chance of proving his nonpaternity.[80]

Many States recently have considered the question of the admissibility of extended factor paternity testing as positive proof of paternity. A New Jersey appellate court has stated flatly that HLA is accepted in the scientific community and that HLA test results are admissible. [*Malvasi v. Malvasi*, 167 N.J.Super. 513, 401 A2d 279 (Ch.Div. 1979).] In California, nonexclusionary HLA test results are admissible as one factor to be weighed among all the other evidence. [*Cramer v. Morrison*, 153 Cal.Rptr. 865, 88 Cal.App.3d 873 (1979).] With respect to the exclusionary findings, "the result of exclusion of paternity by the [HLA] blood test is conclusive" as to that issue. [*Michael B. v. Superior Court of Stanislaus County*, 86 Cal.App.3rd 1006, 150 Cal.Rptr. 586 (1978).] Alaska has instituted a law providing a "presumption of paternity" if blood tests show a 95 percent or greater likelihood of paternity.

As noted above, the UPA specifically provides that scientific paternity test results are admissible for the purpose of proving the alleged father's paternity of the child, in addition to being case determinative where an exclusion is shown. The UPA is in effect in Colorado, Hawaii, Minnesota, Montana, North Dakota, Washington, and Wyoming.[81] The Uniform Act on Blood Tests, section 4, contains similar language. This provision, or one substantially similar, is in effect in nine states: Kentucky, Louisiana, Maine, Mississippi, New Hampshire, Oregon, Pennsylvania, Rhode Island, and Utah.[82] California and Illinois recently amended their versions of one of these uniform acts to allow for the admissibilty of test results as evidence of paternity.[83] Several other States, including Arizona, Georgia, Indiana, Iowa, Kansas, Maryland, Nevada, New York, North Carolina, Ohio, Texas, Virginia, and Wisconsin, have enacted independent blood testing statutes which support inclusionary admissibility.[84]

Some jurisdictions have allowed the results of HLA tests to be admitted into evidence as positive proof, despite statutes that specifically limited "blood test" evidence to the exclusionary variety. [See, e.g., *County of Fresno v. Superior Court*, 154 Cal.Rptr. 660 (Cal.App. 1979); *Cramer v. Morrison*, *supra*; *Camden County Board of Social Services v. Kellner*, 6 FLR 2412 (N.J.Juv.Dom.Rel.Ct. 1980); *Miller v. Smith*, 6 FLR 2660 (Ill. Cir. Ct. 1st Dist. 1980); and *Cutchember v. Payne*, 466 A2d 1240 (D.C.Ct.App. 1982). See also *Phillips v. Jackson*, 615 P2d 1228, 1233 (Utah 1980).] These decisions simply have refused to apply prohibitive statutory language to extended factor genetic testing. The holdings narrowly define the concept of "blood test" to include only the (Landsteiner) red blood cell test, generally the only testing procedure in use when the relevant statute was enacted. By using the restrictive definition, HLA and serum protein tests become something other than blood tests and thus are not prohibited by the statute.

In the absence of specific statutory language, the admissibility of paternity test results is determined by applying the usual test for scientific evidence. The case that established the applicable standard is *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

Under Frye, scientific evidence is admissible only if the scientific principle involved is considered generally reliable and accurate by the scientific community concerned. HLA paternity test results have been deemed reliable and accurate for purposes of the Frye test, and thus admissible, by every appellate court which has taken up the issue since 1979. [See Carlyon v. Weeks, 387 So2d 465 (Fla.Dist.Ct.App. 1980); Tice v. Richardson, 7 Kan.App.2d 509, 644 P2d 490 (1982); Commonwealth v. Blazo, 10 Mass.App. 324, 406 NE2d 1323 (1980); Imms v. Clarke, 654 SW2d 281 (Mo. App. 1983).] At least one appellate court has reached a similar conclusion regarding a testing battery that combined the traditional red blood cell antigen tests with an analysis of red blood cell enzymes and serum proteins. [State ex rel. D.K.B. v. W.G.I., 654 SW2d 218 (Mo.App. 1983).]

Laying a foundation. Unfortunately, convincing the court that paternity test results are accurate and reliable is not the end of the admissiblity battle. As with all extrinsic evidence, the attorney must lay a proper foundation to satisfy the court that the probative value of the evidence outweighs any prejudice to the parties that might result from allowing it to be introduced. Because alleged fathers and their attorneys typically view paternity test results as very powerful evidence, they often will argue that the potential for prejudice is very high and that the court should adhere to strict rules of evidence regarding admissibility. The essential elements of the foundation are authentication of the results, qualification of the expert, and avoidance of hearsay objections that arise when all parties who took part in the testing procedure are not available to testify.

More specifically, as applied to paternity testing, the crucial issues are:

- Was the blood tested the blood of the child, the mother, and the alleged father?
- Did the blood remain in proper condition until the time of the test so that the results of the tests can be trusted?
- Did the person administering the test use proper procedures and approved reagents?
- Did the person administering the test have the scientific knowledge to interpret the tests correctly?[85/]

If the courts were to require a full and complete answer to all four questions as a condition precedent to the offering of the test results, the prospect of litigating paternity cases in the volume demanded by the IV-D Program would be frightful indeed. Nothing less than the live testimony of every individual who formed a link in the "chain of custody" of the blood samples, including every individual who performed a role in the test itself, would be necessary. If such a rule were adopted and enforced, paternity litigation would be prohibitively expensive. Luckily, legislatures and courts have recognized the utility of medical and other scientific evidence and have been lenient in enforcing the technical rules of evidence. However, there must be some assurances that the laboratory that drew and tested the blood samples in any given case followed sound and regular procedures. To make this process more reliable and easier to effect, the American Association of Blood Banks (AABB) has instituted the Laboratory Accreditation Program of the American Association of Blood Banks. Blood testing laboratories must meet certain standards of reliability to earn accreditation from AABB.

Clearly, the most efficient way to lay a foundation for the introduction of the results is to handle all of the evidentiary hurdles with a comprehensive stipulation. The example provided in the appendix to this chapter (Exhibit 10.11) includes provisions dealing with chain of custody and admissibility of the test report as expert opinion, without the necessity of an accompanying live witness. However, introducing the evidence in jury trials by way of stipulation is an ineffective way of presenting the evidence. While it may be sufficient legally, the jury will not be exposed to any testimony regarding the expert's qualifications and the accuracy and reliability of the tests. Because the process of laying the foundation enhances the credibility of the test results, it may not be wise to dispense with the foundation in jury trials or in bench trials before a judge who has little experience with paternity litigation.

The remainder of this section discusses the process of laying a proper foundation for admissibility in States that have neither instructive case law nor an ameliorative statute. The foundation can be broken down into three components, as follows:

- The tests used in the case are accurate and reliable in the opinion of the relevant scientific community.

- The person who signed the bottom line on the report is qualified to render an expert opinion as to the statistical probability of the alleged father's paternity of the child.

- The test results apply to the parties to the action.

In most States, an attorney can achieve all of these ends without the live testimony of the expert. Live testimony from at least one employee of the laboratory will be necessary.

The accuracy and reliability of extended factor blood testing is becoming easier to prove with each passing day. As noted above, a majority of jurisdictions now have statutes which provide for admissibility of such test results. One appellate court has held that the passage of such a statute constitutes a legislative determination that the approved test or tests are accurate and reliable. [Haines v. Shanholtz, 57 Md.App.92, 468 A2d 1365 (1984).] Once the legislature speaks, and the proponent makes a showing that the proffered evidence meets the legislative criteria, the courts lack discretion to consider whether the approved test battery constitutes admissible scientific evidence. The court's function is limited thereafter to the authentication issue and the qualification of the expert. In States with no statute declaring the test results to be admissible, the court may accept the proffered test as accurate and reliable based on a trial brief which cites case law from other jurisdictions, statutory enactments of other jurisdictions, and medicolegal literature. It is also possible, of course, to use the testimony of the expert, either in person or by way of deposition, to establish the accuracy and reliability of the tests employed. To avoid the cost of transporting the expert to the trial, a videotaped or written deposition may be allowed in lieu of live testimony. This last alternative was ruled admissable in a recent North Dakota Supreme Court case. [Williams County Social Services Bd. v. Falcon, 367 NW2d (N.D.1985).]

The qualifications of the expert are more difficult to establish. Again, stipulating to the expert's qualifications can avoid the problem in many cases. Opposing counsel often will make such a stipulation to avoid allowing the impact of the test results to be emphasized by the professional qualifications of the expert. In absence of a stipulation, the IV-D attorney first must show that the potential witness has an ability to draw inferences from facts which is beyond the capability of the average layman. The ability generally must be related to some science, profession, or business occupation, and the witnesses testimony must aid the trier of fact in the search for truth.[86] The court has wide discretion regarding the conferring of "expert" status on any given witness. The following areas should be covered:

- Name and occupational history
- Educational background and training
- Professional licenses/certifications
- Areas of specialization
- Research experience
- Publications in general
- Publications on paternity testing
- Teaching experience
- Attendance at seminars and courses on paternity testing
- Experience providing expert testimony
- Current employment emphasizing scope of work, supervisory authority, and length of time in position.

As noted above in the discovery discussion, it may be possible to produce this evidence in submissible form through the use of videotaped depositions [Williams County Social Services Bd. v. Falcon, supra] or depositions upon written questions. As a last resort, it may be possible to establish the qualifications of the expert with testimony from an employee of the laboratory. There is case law to the effect that the qualifications of persons who make entries in medical records will be presumed unless some indication to the contrary is shown.[87] This rule may be limited to hospital records that were not prepared specifically for use at trial.

The final foundation requirement is the authentication of the report. This is the area most ripe for challenge by opposing counsel. The two most common objections are essentially hearsay problems. It is crucial to convince the court that this is the case, because it will be necessary to rely on at least one hearsay exception in order to overcome the objections. The objections are:

- Without the live testimony of every individual who handled the blood samples from the time they were drawn until the test was complete, the "chain of custody" is incomplete and the test results cannot be authenticated (that is, proven to be based on the blood samples provided by the parties to the lawsuit).
- Any opinion contained in the test result report is hearsay without the live testimony of the expert, and double hearsay to the extent that the expert opinion is based on the results of laboratory procedures carried out by persons other than the expert.

Most States that have adopted the Uniform Parentage Act (UPA) or a blood test statute based on section 10 of the Uniform Act on Paternity (UAP) have a distinct advantage. The UAP provides that a verified expert's report submitted to the court, which contains documentation of the chain of custody of the specimens, is admissible unless a challenge has been made prior to trial. Iowa does not have the UPA; however, it has a model blood test statute, which has given it much the same advantage. [ICA subsect. 675.41.] Two Iowa decisions have construed this provision to allow for introduction of the report without accompanying live testimony. [State ex rel. Buechler v. Vinsand, 318 NW2d 208 (Iowa 1982); State ex rel. Hodges v. Fitzpatrick, --- NW2d --- (Iowa App. 10/25/83).] The latter case points out that, as an exception to the hearsay rule, the statute will be construed narrowly and that all statutory requirements must be adhered to. In that case, the report was held to be inadmissible because the expert submitted it to plaintiff's counsel instead of directly to the court as required by the statute. The case also held that a challenge filed one day prior to trial was timely, a consequence of law's not having an explicit cut-off date.

In most States, no such specific statutory shortcut is available. There are often other statutory alternatives that avoid the necessity of an appearance by the expert. Many States have adopted a version of the Uniform Business Records as Evidence Act[88] or the Uniform Rules of Evidence,[89] or have case law establishing a similar rule. If such authority exists, it should be possible to qualify the report as a business record and thereby escape the hearsay problem. Several decisions conclude that a hospital or laboratory is a "business" for purposes of the exception. [See State v. Carter, 591 SW2d 219 (Mo.App. 1979); McCormick on Evidence, sec. 313, pp. 730-733.]

To take advantage of the business records exception, it will be necessary to bring in the venipuncturist to testify to the drawing and packaging of the blood samples and their delivery to an agent of the laboratory. Once it is established that the samples were delivered to the laboratory, any employee of the laboratory should be able to lay a foundation for the introduction of the test report. The witness will have to be familiar enough with the identity and mode of preparation of the test report to testify that the document was prepared in the ordinary course of business, that the entries on the report were made at or near the time of the transaction recorded, and that all necessary procedures and documentation protocols were followed. It is particularly important that the witness establish the chain of custody from entries made on the report document by employees of the lab, as well as identify the signature of the expert. In States which have not adopted a business records statute, case law should provide similar authority.

The second hearsay problem concerns the fact that the expert may not have supervised the lab technicians directly as they carried out the procedures to isolate and identify the genetic characteristics of the individuals tested. Again, a uniform act can come to the rescue. The Uniform Composite Reports as Evidence Act provides that an expert may testify to his conclusions even where they are based wholly or partly on written information furnished by several persons acting for a common purpose.[90] [See Houghton v. Houghton, 179 Neb. 275, 137 NW2d 861 (1965), and 3 Wigmore, Evidence, sec. 572(a) (Chadbourn Rev. 1972).] In those States that have adopted the Federal Rules of Evidence, a similar argument can be made under Federal Rule 803(6).

If all else fails, the IV-D attorney should argue to the court that the blood test results are admissible under the "wildcard" exception to the hearsay rule, exemplified by Federal Rule 804(b)(5). When the declarant is unavailable to testify, the court has authority to allow hearsay evidence that has circumstantial guarantees of trustworthiness and:

- Is offered as evidence on a material fact

- Is more probative than other evidence the proponent can procure through reasonable efforts

- Where admission of the evidence will serve the purposes of the rules and interests of justice.

The blood test report is clearly relevant to a material fact. There are numerous quotations from courts across the country regarding the value of blood test evidence in paternity proceedings. Since test results are prohibitively expensive when the expert must be brought in to testify in person in every case, the interests of justice clearly are not served by strict adherence to the rules. The medical profession frequently makes life and death decisions based on expert opinions produced by similar, or less stringent, procedures.

It is also good to point out that the evidence involved can be reproduced. The cases which establish the importance of a continuous, unbroken chain of custody and live testimony from all persons who took part in the scientific analysis are generally criminal cases involving blood-alcohol levels, which change over time, or blood samples that were obtained at the scene of a crime. In such instances, the defendant's procedural rights are greater than in civil paternity cases. More importantly, the courts have fewer alternatives. The samples could be neither reobtained nor verified. In paternity cases, there are two alternatives that serve the interests of justice better than refusing the admission of the evidence. The alleged father has the opportunity to ask for a second set of tests when he is not satisfied with the results of the first, and he has the opportunity to call the laboratory personnel to testify should he feel the need for extensive cross-examination.

It may be possible to avoid the hearsay problem by requesting that the defendant admit that blood tests show certain resemblance based on genetic similiarity. If the defendant refuses to admit this fact during discovery then costs of proof may be imposed as part of the final judgment.

Closing Argument and Jury Instructions

After the evidence has been submitted, and before the judge's or jury's deliberations, the attorneys for both sides customarily present a closing argument or summation. According to Professor Keeton, a good closing argument in a jury trial should pass two tests: "Does it make the jury want to find for your client? Does it tell the jury how to find for your client?"[21]

One effective method for achieving both of these goals in jury trials is to construct and deliver a sincere argument that is structured around the instructions that the jury will use in its deliberations. The attorney walks the jury through the instructions, and relates the evidence to each instruction by referring to the evidence in the record to support his or her client's version of the facts, and to point out inconsistencies and weaknesses in the other side's case. It is also a good idea to refer back to the opening statement and note that the plaintiff's witnesses in fact did deliver what was promised to the jury at the outset.

After the closing arguments, the judge in a jury trial will read the instructions to the jury and send them off to deliberate a verdict. Counsel must prepare the jury instructions and submit them to the judge for approval prior to trial. Many States have a set of mandatory "form jury instructions" which must be used verbatim in paternity cases. If such is the case, the IV-D attorney must take great care in ensuring that the instructions submitted and approved by the court conform with the mandatory forms. Where the case deviates factually from the form instructions, substitute instructions should be drafted with care and approved by opposing counsel if possible.

In many States, no form instructions exist. Exhibit 10.16, appearing at the end of this chapter, contains a set of sample jury instructions currently in use in Los Angeles County, California.

FOOTNOTES

/1/ Krause, Child Support in America: The Legal Perspective 799 (1981).

/2/ See, for instance, Missouri's version of the Uniform Declaratory Judgment Act, Ch. 527 RSMo (Supp. 1984).

/3/ State ex rel. Anonymous v. Murphy, 354 SW2d 42 (Mo.App. 1962); J.E.S. v. B.J.F., 240 So2d 520 (Fla.App. 1970).

/4/ See, however, Kulko v. Superior Court, 436 US 84, 98 SCt 1690, 56 LEd2d 132 (1978), which discusses the limits of a court's jurisdiction to establish a support order.

/5/ This discussion assumes no statutory direction. Section 19(a) of the Uniform Parentage Act (UPA) provides for appointment of counsel for indigent parties. This section has been enacted by the States of Hawaii, Minnesota, Montana, North Dakota, and Wyoming. California, Colorado, and Washington have adopted versions of UPA without section 19(a). Readers are encouraged to refer to statutes in effect in their States.

/6/ See also Hepfel v. Bradshaw, 279 NW2d 342 (Minn. 1979); Reynolds v. Kimmons, 569 P2d 799 (Alaska 1979); Artibee v. Cheboygan, 397 Mich. 54, 243 NW2d 248 (1978); M. v. S., 169 N.J.Super. 209, 404 A2d 653 (1979); State ex rel. Graves v. Daugherty, 266 SE2d 142 (W.Va. 1980).

/7/ Eldridge, p. 335; Lassiter, supra, p. 27.

/8/ Snodgrass, supra, p.742.

/9/ Stout, supra, pp. 1134-1135.

/10/ The use of the term "State" here is intended to include both State and county governments. As to which entity ultimately finances the cost of the testing, no opinion is intended. That issue is a matter for State law.

/11/ Uniform Parentage Act, 9A U.L.A. sec. 10.

/12/ State ex rel. Goodner v. Speed, 96 Wash.2d 838, 640 P2d 13, at p. 15 (1982).

/13/ *Krause*, *supra*, pp. 184-188; Anno., "Statutes Limiting Time for Commencement of Action to Establish Paternity of Illegitimate Child As Violating Child's Constitutional Rights," 16 ALR4th 926.

/14/ *Mills*, *supra*, p. 104; *Pickett*, *supra*, p. 2209.

/15/ *State Dept. of Revenue v. Wilson*, 634 P2d 172 (Mont. 1981); *County of Lenoir ex rel. Cogdell v. Johnson*, 46 N.C.App.182, 246 SE2d 816 (1980); *Locke v. Zollicoffer*, 608 SW2d 54 (Ky. 1980); *State ex rel. B.V.P.* 284 A2d 912 (W.Va. 1981); *State Department of Health and Rehabilitative Services on behalf of Gillespie v. West*, 378 So2d 1220 (Fla. 1979); *Shifter v. Wolf*, 327 NW2d 429 (Mich.App. 1982); *State ex rel. Adult and Family Services Division v. Bradley*, 295 Or. 216, 666 P2d 249 (Or.Ct.App. 1982).

/16/ *Cook v. Askew*, 34 Ill.App.3d 1055, 341 NE2d 13 (1975); *First v. Lewis*, 99 Misc2d 761, 417 NYS2d 194 (1979); *F. v. M.*, 363 NE2d 1030 (Ind.App. 1977); *Anonymous v. Anonymous*, 43 Misc2d 949, 266 NYS2d 505 (1965).

/17/ However, see 59 ALR3d 685, sec. 3.

/18/ 84 ALR2d 524 (1962), 10 AmJur2d Bastards, secs. 98 *et. seq*.

/19/ *Walker v. Walker*, 266 So2d 385 (Fla.App. 1972); *Tuer v. Niedoliwka*, 92 Mich.App. 694, 285 NW2d 424 (1979).

/20/ 84 ALR2d 524 (1962).

/21/ 20 ALR3d 500 (1968).

/22/ *Gray v. Plummer*, 87 Ga.App. 331, 73 SE2d 569 (1952).

/23/ *Naimo v. LaFianza*, 146 N.J.Super. 362, 369 A2d 987 (1976).

/24/ Uniform Parentage Act, 9A U.L.A. sec. 6(d); *Polk v. Harris*, 46 Md.App. 591, 420 A2d 1004 (1981).

25/ *State v. Bashura*, 37 Conn.Super. 745, 436 A2d 785 (1981).

/26/ Havighurst, "Settlement of Paternity Claims," 1976 Ariz.St.L.J. 461, 468.

/27/ Conn.Gen.Stat.Ann., sec. 466-172.

/28/ See, e.g., Reissue Rev. Stat., sec. 13-113 (1943), repealed L.B. 845, sec. 35 (1984).

/29/ See, e.g., Wis.Stat.Ann., sec. 767.47(8).

/30/ *H.H. v. I.I.*, 335 NYS2d 274, 286 NE2d 717 (1972); *Minnich v. Rivera*, --- NE2d ---, 11 FLR 1020 (Pa.Ct.Com.Pl. 1984).

/31/ N.C.Gen.Stat. sec. 49-14 (1976, Supp. 1977); *Toryak v. Spagnuolo* 292 A2d 654 (W.Va. 1982).

/32/ This section is based on *Missouri Family Law* (Jefferson City, MO: The Missouri Bar, 1982), sec. 18.52.

/33/ Uniform Parentage Act, 9A U.L.A. sec. 10.

/34/ *Id*.

/35/ N.H.Rev.Stat.Anno., sec. 34-704 (1955); Colo.Rev.Stat., sec. 19-7-103 (1971); 13 Del. Cod., sec. 512 (1984); Ga.Code Anno., sec. 74-9901 (1902); Iowa Code, sec. 675.17 (1967); Md. Code, Art. 16, sec. 66F (1963); R.I.Gen.L., sec. 15-8/20 (1979); Wisc.Stat.Anno., secs. 767.23 (1979) and 767.51 (1979); all cited in C. Kastner and L. Young, *A Guide to State Child Support and Paternity Laws*, (Denver, CO: National Conference of State Legislatures, 1981).

/36/ C.A. Wright, *Law of Federal Courts*, sec. 89, pp. 392-395.

/37/ *Champlin v. Oklahoma Furniture Mfg. Co.*, 324 F2d 74 (CA 10, 1963).

/38/ *Wright*, *supra*, fn. 19, p. 394.

/39/ *Wright*, *supra*, fn. 19, p. 391.

/40/ B. Spivey, *Manual for the Trial of Contested Paternity Cases* (Austin, TX: Department of Human Services, 1977); OCSE-IM-78-32, p. 12.

/41/ *Id*., p.12.

/42/ *Wright*, *supra*, fn. 45, p.386.

/43/ F.R.C.P. 30.

/44/ *Spivey*, *supra*, fn. 49, p.13.

/45/ *Id*., p.14.

/46/ F.R.C.P. 34(b).

/47/ *Wright*, *supra*, fn. 19, p. 386.

/48/ 10 AmJur2d, Bastards, sec. 93.

/49/ *Wright*, *supra*, fn. 19, p. 391. But see *Wasmund v. Nunnmaker*, 277 Minn. 52, 151 NW2d 577 (1967).

/50/ F.R.C.P. 35(b)

/51/ *Essex Co. Div. Welfare v. Harris*, 460 A2d 713 (N.J.Super.App. Div. 1983); *State of Washington v. Meacham*, 93 Wash.2d 738, 612 P2d 795 (1980); *Dept. of Soc. Serv. v. Thomas J.S.*, --- Misc.2d ---, --- NYS2d --- (1984); *Territory of Hawaii v. Lanier*, 40 Haw. 65 (1953). *In re the Paternity of D.A.A.P.*, 344 NW2d 200 (Wis.App. 1983).

/52/ List adapted from "Motion in Limine Practice," 20 AmJur Trials 444, 451-452.

/53/ This section is based on: Handbook For Processing a Jury Paternity Trial (Los Angeles, CA: Office of the District Attorney, Bureau of Support Operations, County of Los Angeles, CA, 1982), sec. 9.0.

/54/ California Code of Civil Procedure, sec. 601.

/55/ Spivey, supra, fn. 49, p.29.

/56/ Id., p. 29.

/57/ Uniform Parentage Act, 9A U.L.A. sec. 12.

/58/ Uniform Parentage Act, 9A U.L.A. sec. 14.

/59/ 10 AmJur2d, Bastards, sec. 112.

/60/ Holz, J., "The Trial of a Paternity Case," 50 Marquette Law Rev. 450 (1967); see also Matter of Kuhn's Estate, 229 Kan. 536, 626 P2d 794 (1981).

/61/ Haley v. Metropolitan Life Ins. Co., 434 SW2d 7 (Mo.App. 1968).

/62/ T.A.L.S. v. R.D.B., 539 SW2d 737 (Mo.App. 1976).

/63/ Rossmiller v. Becker, 157 Neb. 756, 61 NW2d 393 (1953).

/64/ Va.Code, sec. 64.1-5.2(4).

/65/ Va.Code, sec. 64.1-5.2(1).

/66/ Va.Code, sec. 64.1-5.2(3).

/67/ Cal.Evid.Code, secs. 1220, 1221.

/68/ 10 AmJur2d, Bastards, sec. 109.

/69/ Holz, supra, fn. 70, p. 461.

/70/ 10 AmJur2d Bastards, sec. 114, and Holz, supra, p. 462-464.

/71/ T.A.L.S. v. R.D.B., supra; S---J---B--- v. S---F---S---, 504 SW2d 233 (Mo.App. 1973).

/72/ T.A.L.S., supra.

/73/ Wershub, "Sexual Impotency in the Male" (1959), cited in Holz, supra, p. 471.

/74/ Holz, supra, p. 473.

/75/ This discussion has been adapted from Robert E. Keith, "Resolution of Paternity Disputes by Analysis of the Blood," 8 FLR 4001, Nov. 24, 1981 (monograph); and Probability of Inclusion in Paternity Testing: A Technical Workshop (American Association of Blood Banks, 1982).

/76/ *Berry v. Chaplin*, 74 Cal.App.2d 652, 169 P2d 442 (1946). In deference to the court, it should be noted that possible errors in the blood analysis had been alleged--i.e., (1) lack of training of the serologist, (2) use of commerical sera, and (3) failure to make a countertest. [169 P2d, at 451.]

/77/ S. Schatkin, *Disputed Paternity Proceedings*, sec. 9.13 at 38-40 (rev.ed. 1979). However, see *State v. Camp*, 286 N.C. 148, 209 SE2d 754 (1975).

/78/ M. W. Shaw and M. Kass, "Illegitimacy, Child Support and Paternity Testing," 13 Houston Law Rev. 41-51 (Oct. 1975).

/79/ M. Larson, "Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond," 13 J.Fam.L. 713, 716-7 (1973-1974); C. Lee, "Current Status of Paternity Testing," 7 Fam.L.Q. 615, 616-7 (Winter 1975); S. Sass, "The Defense of Multiple Access (Exceptio Plurium Concubentium) In Paternity Suits: A Comparative Analysis," 51 Tul.L.R. 468, 501 (April 1977) E.D. Walker, *Inclusion Probabilities in Parentage Testing* (Arlington, VA: American Association of Blood Banks, 1983).

/80/ *Shaw and Kass*, *supra*, fn. 11.

/81/ Colo.Rev.Stat. 19-6-112 to 19-6-114 (1977); Hawaii Rev.Stat. 584-11 to 584-13 (1980 Supp.); Minn.Stat.Ann. 257.62 to 257.64 (1980); Mont.Rev.Codes Ann. 40-6-112 to 40-6-115 (1975); N.D. Cent. Code 14-17-10 to 14-17-15 (1975); Wash.Rev.Code 26.26.100 to 26.26.110 (1976); Uniform Parentage Act, 9A U.L.A., Comments (Supp. 1984).

/82/ Ky.Rev.Stat. 406.081-406.111 (1964); La.Stat.Ann. 257.62-257.64 (1980); 19 Me.Rev.Stat. 277-280 (1967); Miss.Code 93-9-21 to 93-9-27 (1962); N.H.Rev.Stat.Ann. 522:1-522:10 (1953); 10 Okla.Stat. 109.250-109.262 (1969); 42 Pa.Cons.Stat.Ann. 6133-6138 (1978); Gen.Laws of R.I. 15-8-11 to 15-8-15.

/83/ Cal.Evid.Code, sec. 895 (1982 Supp.); 40.11 Rev.Stat. 1401 to 1407 (1980).

/84/ Ariz.Rev.Stat.Ann. 12-847 (1979); Ga.Code Ann. 74-306, 74-307 (1980); Ind.Stat.Ann. 31-6-6. 1-8 (1980); Iowa Code Ann. 675.41 (1980); Kan.Stat.Ann 23-131, 23-132 (1970); Nev.Rev.Stat. 126.121-126.151 (1979); N.Y.Fam.Ct.Act 532 (1981 Supp.); N.C.Gen.Stat. 49-7, 8-550.1 (1979); Ohio Rev.Code Ann. 3111.09, 3111.10 (1982); Tex.Fam.Code Ann. 13.02-13.06 (1975); Va.Code 20-61.2 (1982 Supp.); Wisc.Stat.Ann. 14-2-109 to 14-2-112 (1978).

/85/ *Phillips v. Jackson*, *supra*.

/86/ McCormick, *Evidence* 29, 30 (2d ed., 1972).

/87/ *Id.*, p. 732.

/88/ Uniform Business Records as Evidence Act, 9A U.L.A., 1965 (withdrawn 1966).

/89/ Uniform Rules of Evidence, 13 U.L.A., 1974.

/90/ Uniform Composite Records as Evidence Act; Neb.Rev.Stat., secs. 25-12, 115 to 25-12, 119 (1951).

/91/ Keeton, Trial Tactics and Methods 273 (1973).

EXHIBIT 10.1

IN THE CIRCUIT COURT OF _______________ COUNTY
STATE OF _______________

State of _______________, ex rel.	)	
(child) _______________, by	)	
(next friend) _______________,	)	Case No. _______________
and	)	
(IV-D Agency) _______________,	)	WAIVER OF SERVICE
Plaintiffs,	)	
vs.	)	
___________________________,	)	
Defendant.	)	
	)	

I, ___________________________________, Defendant herein, acknowledge receipt of the Petition For Declaration of Paternity and Order of Support filed by Plaintiff in this action, and hereby waive my right to service of process pursuant to _____(State)_________ Court Rule _______________.

____
Defendant
____
____
Address

Subscribed and Sworn to before me this _______________ day of _______________, 19 ___.

____
Notary Public
My Commission expires: __________

EXHIBIT 10.2*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
(child)__________________,by)
(next friend)__________________,)
and)
(IV-D Agency)__________________,)
Plaintiffs,)
)
vs.)
____________________________,)
Defendant.)
)

Case No. ________________

AGREEMENT FOR ENTRY OF JUDGMENT

Plaintiff (IV-D Agency)______________, an executive agency of the State of ___________________________, is obligated by statute to establish paternity and enforce support obligations for and on behalf of the minor child(ren) of the defendant, identified hereinafter; and

The defendant understands that he has the following rights: the right to consult an attorney about his rights and liabilities concerning paternity and child support and reimbursement of public assistance; the right to bring an independent action under the law for custody or visitation rights; the right to file an answer to this civil action; the right to be represented by an attorney; the right to trial by jury if he denies that he is the father; the right to present any relevant defenses; the right to examine and cross-examine witnesses; the right to court-appointed counsel if the court finds the defendant to be indigent; and the right to have the court determine the proper amount of child support and reimbursement of public assistance; and

The defendant understands that a judgment for child support may be the basis for either a civil contempt or a criminal prosecution for his failure to abide by the terms of the judgment; and

The defendant understands that a judgment establishing paternity and providing support and reimbursement of public assistance will be entered against him in this case based upon the facts stipulated to between the plaintiff and the defendant; and

The defendant understands that he need not stipulate to these facts and may, if he desires, contest any or all of them in court.

*Source: Los Angeles County Family Support Representative Establishment Training Manual, Vol. I, pp. 10-64 - 10-68.

The defendant hereby waives the rights mentioned above and willingly, knowingly, and intelligently enters into this stipulation solely because it reflects his wishes.

IT IS HEREBY STIPULATED by and between the plaintiffs and the defendant that:

1. ______________________________ is the mother and the defendant is the father of the following named child(ren):

2. Said minor child(ren) are being cared for by ____________ ____________________________ in __________ County, ___(State)____.

3. The defendant has the ability to pay and that he be ordered to pay toward the support of said minor child(ren), by paying to _______________ through the Office of the Court ______________, pursuant to Section __________ the sum of $______________ per month, commencing on _______________________, and continuing thereafter until all said child(ren) die, marry, reach the age of majority, become self-supporting, are otherwise emancipated, or until further order of court.

4. Said minor child(ren) is/are __________ receiving Aid to Families with Dependent Children benefits.

5. The defendant understands that the court has continuing authority to make an order increasing or decreasing the amount of child support payments. The defendant understands that he has the right to request that the court order the child support payments be decreased or eliminated entirely.

6. The defendant agrees to pay to the plaintiff, (IV-D Agency) ______________________________ the sum of $_____, as and for reimbursement of public assistance paid to defendant's child(ren), payable through the Office of the Court ______________, together with interest on said judgment as provided by law. Defendant agrees to pay this amount at the rate of $____________ monthly, payable on the _____ day of each month, commencing ____________________ and continuing until paid in full.

7. The plaintiff agrees to forego any further alternative collection activities so long as the defendant is current in his payment of the principal sum set forth in paragraph six (6). The defendant understands and agrees that should he default in one (1) payment of said principal sum, the entire balance of the amount unpaid will become due and owing, and the plaintiff, (IV-D Agency), may use any collection activity legally available to collect the entire amount remaining unpaid.

Dated: _________________________ ________________________________

Defendant

I have read the above stipulation for entry of judgments and have advised my client to the rights and consequences of stipulating or not stipulating hereto.

Dated: ____________________________

____
Attorney for Defendant

____
District Attorney

by

Dated: ____________________________

____
Deputy District Attorney
Attorney for Plaintiffs

EXHIBIT 10.3*

IN THE CIRCUIT COURT OF ______________ COUNTY
STATE OF ______________

State of ______________, ex rel.)
(child) ____________________,by)
(next friend) ____________________,) Case No. ______________
and)
(IV-D Agency) ____________________,) MOTION FOR ORDER APPOINTING
Plaintiffs,) GUARDIAN AD LITEM

vs.)
____________________,)
Defendant.)
)

COMES NOW plaintiff, (IV-D Agency) ______________________, by and through the District Attorney of ______________ County, ______________, pursuant to ____________________, and states to the Court that plaintiff [child(ren)] ______________________________; is/are minor(s), and said minor(s) desire(s) to prosecute an action for declaration of paternity against (defendant) ______________________________; that said minor(s) has/have no legally appointed guardian.

WHEREFORE, plaintiff (IV-D Agency) ____________________ asks the court to make an order appointing (name) ____________________ guardian ad litem of [child(ren)] ______________________ for the above named purpose.

STATE OF ____________________)
) ss
COUNTY OF ____________________)

______________________________, being duly sworn, upon his/her oath, states that (s)he is attorney for above-named plaintiffs and that the facts and matters therein are true according to the best of his/her knowledge and belief.

____
District Attorney

____
By: Assistant District Attorney
Attorney for Plaintiffs

Subscribed and sworn to before me this __________ day of ____________________, 19 ___.

____
Notary Public

My Commission expires ______________________________

*Source: Missouri Prosecutor's Deskbook, Form 63-2.

EXHIBIT 10.4*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
(child)____________________________,by)
(next friend)______________________,)
and)
(IV-D Agency)______________________,)
Plaintiffs,)

vs.)
____________________________,)
Defendant.)
)

Case No. _______________

Division No. ___________

ORDER APPOINTING GUARDIAN AD LITEM

A motion having been made for the appointment of a guardian ad litem in the above-entitled cause, and the Court having been fully advised in the premises,

IT IS FOUND THAT ____, known to the court to be a competent person, to be guardian ad litem of [child(ren)]____, is appointed as such.

____
Judge of the Circuit Court
_____________________ County

Date: __________________________

*Source: Missouri Prosecutor's Deskbook, Form 63-2.

EXHIBIT 10.5

IN THE CIRCUIT COURT OF ______________ COUNTY
STATE OF ______________

State of ______________, ex rel.	)	
(child) ______________, by	)	
(next friend) ______________,	)	Case No. ______________
and	)	
(IV-D Agency) ______________,	)	PETITION FOR DECLARATION OF
Plaintiffs,	)	PATERNTIY AND ORDER OF SUPPORT
vs.	)	
______________,	)	
Defendant.	)	
	)	

COUNT I

COME NOW your plaintiffs, (child) ______________, by his/her next friend, (next friend) ______________, and (IV-D Agency) ______________, an agency obligated by statute to support dependent children, and for Count I of their actions seeking declaration of paternity state that:

1. Plaintiff (child) ______________ is the (fe)male minor child of (mother) ______________ and defendant (alleged father) ______________, and resides at (child's address) ______________.

2. (next friend) ______________ has consented to serve and is bringing this action as next friend for (child) ______________.

3. (IV-D Agency) ______________ is also bringing this action individually as plaintiff pursuant to ______________.

4. Defendant (alleged father) ______________ resides at (address) ______________.

5. On or about (date) ______________, plaintiff (child) ______________ was born to (mother) ______________ at (place of birth) ______________.

6. Plaintiff ______________ was born out of wedlock.

7. Defendant is the natural father of plaintiff (child) ______________.

8. Plaintiff (child)____________________________ is/is not receiving public assistance.

COUNT II

COMES NOW your plaintiff, (child)______________________, through his/her next friend, (next friend)______________________, and for his/her cause of action for support states that:

1. He/She realleges and incorporates by reference as if fully set out herein, allegations 1 through 7 of Count I of this petition above written.

2. Defendant (alleged father)____________________ has sufficient income and property from which to pay a reasonable sum each month as and for the support of plaintiff (child)____________________________.

3. Plaintiff ______________________________ is without adequate sums to support him/herself.

4. $________ is a reasonable and necessary amount for the support of plaintiff ______________________________________.

COUNT III

COMES NOW your plaintiff, (IV-D Agency)___________________, and for its cause of action for reimbursement of support states that:

1. It realleges and incorporates by references as if fully set out herein, allegations 1 through 7 of Count I of this petition above written.

2. From (beginning date)______________________, 19 ___, to (end date)______________________, 19___, defendant was separated from and did not provide support for plaintiff (child)_________________________. As a result of such separation and failure to provide support, plaintiff (IV-D Agency)___________________ paid public assistance during the aforementioned period in the amount of (total)________________, pursuant to (AFDC statute)________________.

3. During the aforementioned period, there was no order of support issued by any court of competent jurisdiction requiring defendant (alleged father)_________________________ to support plaintiff (child)_________________________.

4. During the aforementioned period, defendant (alleged father)_____________________ did not pay support for plaintiff (child)_________________________, except the sum of $_____________. The difference between the amount so paid and the amount which plaintiff (IV-D Agency)__ provided his child in public assistance, as set forth in paragraph "2" of the count is $________. Defendant _____(alleged father)________ is therefore liable, pursuant to (statute/common law of this State), to reimburse plaintiff (IV-D Agency)______________, in the amount of $____________________.

5. Defendant ______(alleged father)_________ is able to pay reasonable attorney's fees and court costs as determined by the court in this matter.

WHEREFORE, plaintiffs pray for judgment against defendant (alleged father)__________________ as follows:

1. That defendant _____(alleged father)_______ be adjudged the father of plaintiff _____(child)___________________________.

2. That defendant ___(alleged father)_____ be ordered to pay a reasonable sum each month for the support of plaintiff ___(child)_____.

3. That judgment be rendered against defendant ____(alleged father) in the amount of $__________ as and for reimbursement of public assistance paid for the benefit of plaintiff ____(child)__________ by plaintiff _____(IV-D Agency)_______.

4. That an assignment of defendant ___(alleged father)____'s wages be ordered pursuant to ____(statutory section)______.

5. That defendant ___(alleged father)_______ be ordered to pay a reasonable sum for attorney's fees to the County of __(or State)_________.

6. That defendant be ordered to pay court costs incurred in this action.

7. That all sums be ordered payable through the Office of the Court __________________.

8. For such other relief as the court may deem proper.

____
District Attorney

By

____
Assistant District Attorney
Attorney for Plaintiffs

Dated: ________________________

EXHIBIT 10.6*

IN THE CIRCUIT COURT OF ______________ COUNTY
STATE OF ______________

State of ______________, ex rel.)
(child) ______________,by)
(next friend) ______________,)
and)
(IV-D Agency) ______________,)
Plaintiffs,)
)
vs.)
______________,)
Defendant.)
)

Case No. ______________

REQUEST FOR TEMPORARY ORDER FOR CHILD SUPPORT, POINTS AND AUTHORITIES

Plaintiffs request the following temporary orders from the above-entitled Court:

1. An order directing the defendant to pay $____________ per child per month, totaling $_________ per month, to ______________, as and for the support of the minor plaintiff(s) herein who is/are alleged to be the child(ren) of said defendant.

2. An order directing the defendant to provide medical insurance coverage for the said minor plaintiff(s).

3. An assignment of defendant's wages to enforce the above requested orders.

4. Attorneys' fees for plaintiffs.

DATED: ______________________

____
District Attorney

By ______________________________
Assistant District Attorney
Attorney For Plaintiffs

*Source: Paternity Case Processing Handbook, pp. 60-62.

(POINTS AND AUTHORITIES)

I

______________________ provides that the IV-D agency may bring an action to determine parental relation.

II

______________________ provides that both the father and the mother of the child, have an obligation to support that child. In a civil suit to enforce such obligation, the court has the power to order and enforce performance thereof the same as in a suit for dissolution of marriage.

III

______________________ provides that during the pendancy of all proceedings for child support pursuant to ______________________________, the court may order temporary spousal and/or child support. ____________________________ provides that the court may order either or both parents to pay child support in any proceeding where the support of a minor child is in issue.

______________________ provides that the State may proceed on behalf of a person to whom a duty of support is owed to enforce his right of support against the person who owes the duty of support. The court may order attorney fees and costs in any proceeding brought by the State pursuant to this Section.

IV

______________________ provides that the District Attorney shall take appropriate action to enforce child support obligations when the child is receiving Public Assistance and when requested to do so by the individual on whose behalf the enforcement efforts will be made when the child is not receiving Public Assistance.

V

____ held that the court may order temporary child support in an action to enforce the obligation of a parent to support his child.

DATED: ________________________

Respectfully submitted,
District Attorney

By ______________________________
Assistant District Attorney
Attorney for Plaintiffs

A copy of this request and points
and authorities was mailed to all
parties to record this ________
day of _____________, 19 ___.

____
Assistant District Attorney
Attorney for Plaintiffs

EXHIBIT 10.7*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
(child)____________________,by)
(next friend)________________,)
and)
(IV-D Agency)________________,)
Plaintiffs,)

vs.)
____________________________,)
Defendant.)
)

Case No. ______________

REQUEST FOR ADMISSION OF FACTS

COMES NOW plaintiff and requests, pursuant to Rule _______ that defendant admit to the following:

1. The following documents, copies of which are attached, are genuine and accurately reflect matters contained therein.

2. Defendant is the natural father of the child(ren) named as plaintiff(s) in this action.

3.)
)
4.) Any other fact sought to be admitted separately set out.

____
District Attorney

____
By Assistant District Attorney
Attorney for Plaintiffs

*Source: Missouri Prosecutor's Deskbook, Form 62-3.

EXHIBIT 10.8*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.	)	
(child) ________________, by	)	
(next friend) ________________,	)	Case No. ______________
and	)	
(IV-D Agency) ________________,	)	PLAINTIFF'S FIRST INTERROGATORIES
Plaintiffs,	)	
vs.	)	
____________________________,	)	
Defendant.	)	
	)	

PLEASE TAKE NOTICE that, pursuant to Rule ________ of the (State) __________ Rules of Civil Procedure, Plaintiffs request that the Defendant answer the following interrogatories under oath. Such interrogatories shall be answered fully and in writing. A copy of the answers must be served on the undersigned attorney within __________ days after service hereof.

Preliminary Statement

1. If it is not possible to answer one or any subject of these interrogatories in full, after exercising due diligence to secure the information to do so or if objection is made to any one or subpart, explicitly so state listing the reason for any objections. Answer every other interrogatory and subpart, and provide any information in your possession which may partially answer the interrogatory or subpart which you cannot answer in full.

2. In answering these interrogatories, please identify every document used or referred to in the preparation of each of your answers. Each document should be identified by name, author and date, and current custodian.

3. All words used herein have the meaning ordinarily associated with their common usage unless otherwise noted in the text.

4. If you cannot answer an interrogatory in the space provide, you may number and complete the answer on additional pages.

5. Sign the completed interrogatories, attesting to the truth and accuracy of the answers.

*Source: Missouri Prosecutor's Deskbook, Form 62-4.

6. The answers to these interrogatories must be supplemented in accordance with Rule ________________.

INTERROGATORIES

1. What is your full name, address, telephone number, Social Security number, and date of birth?

2. Are you now employed? _______ If employed, give the following information:

(a) State the name, address, and telephone of your employer.

(b) State the length of time so employed.

(c) State your general duties.

(d) State your gross salary per month.

(e) State your net salary per month.

3. If unemployed, state the length of time you have been unemployed.

4. If unemployed, state the name, address, and telephone number of your last employer.

(a) State the length of time of that employment.

(b) State your general duties.

(c) State your gross salary from that job.

(d) State your net salary from that job.

5. State your present total income from all sources, and list the sources, other than earned income.

6. State money in deposit or savings accounts in any banks, if any, and list each bank with the amounts of deposit.

7. Have you filed any income tax returns with the Federal Government or any State in the past two (2) years? If so, state the gross income listed on each return.

8. Did you declare minor dependent(s) on your Income Tax return?

(a) If so, please state the name and date of birth of each. Please submit copies of your Federal and State Income Tax returns for the past two (2) years.

9. Are you acquainted with (mother)________________? If your answer is "yes," answer the following:

(a) State when and where you first met her, and fully describe the circumstances.

(b) Did you obtain from her, her name, address, and telephone number?

10. Did you ever visit her in the State of ____________? If your answer is "yes," answer the following:

(a) When, where, and how many times did you visit her?

(b) Was anyone else present when you visited her and, if so, list the names of all persons present?

11. Did you ever live at the same address as (mother)? If yes, state the address and the date(s).

12. Did you ever stay overnight in the home of (mother)? If "Yes," state the address and the date(s).

13. Between ____________________ and (dates of probable period of conception), did you have sexual intercourse with the (mother)________________? If "Yes," state when, where, how many times sexual intercourse with (mother)________________ took place during this time period.

14. Did you ever tell anyone that you had sexual intercourse or an affair with (mother)____________________? If you did, list the names and addresses of such persons.

15. Do you claim that persons other than yourself engaged in sexual intercourse between ________ and ________ with (mother)__________________? If so, please state the following for each such participant:

(a) Name(s) and address(es).

(b) Date(s) and place(s) of each such occurrence.

(c) Whether or not you plan to call said person(s) as your witness(es).

16. Please state the names, addresses, and telephone numbers of all persons you know may have any information relevant to this case.

17. Please state generally the information each of said persons is expected to have.

18. Please state your blood type, including RH factor.

19. At any time that you had sexual intercourse with (mother)________________, did you use any birth control measures? Did she? If "yes," state what measures were used by either or both of you, and when such measures were used:

20. Did you know that (mother)____________________ gave birth to a child on ____________________________?

21. If your answer to No. 20 is "yes," did you ever tell (mother)____________________ that you were the father of ___(name child)__?

22. Did you ever tell any other person that you were the father of (name child)_________________________? If "yes," please state the names and address of all such persons to whom such statements have been made:

23. If in your answer you specifically deny that you are the father of (name child)____________ , please state in detail why you do not think you are the father.

24. Do you claim that you were or are either sterile or impotent? If "yes" to either claim, specifically state the grounds for same.

25. Do you own an automobile? If "yes," please state the model, year, and color of any such automobile(s).

26. Did you ever take or offer to take (mother)__________________ to a doctor? If so, when and where?

27. Did you take or offer to take (mother)________________ to a hospital for the delivery of __(name child)____? If so, state details.

28. Were you married to (mother)______________ at the time of the birth of __(name child)_? If so, state the date of the marriage, and the date of separation and/or divorce, if applicable.

29. Did you ever offer to marry (mother)____________________?
If so, when, where, and why?

30. If you were married to (mother)___________________, were you also married to anyone else? If so attach copy of marriage certificate.

31. Did you ever offer to pay towards the support of (name child)_______? If so, please state details.

32. Did you ever offer to adopt ___(name child)____? If so, why?

33. Do you carry any insurance? If so, state name and address of the insurance company. State the type of insurance, the general coverage, and the policy number.

34. Give the name(s) and address(es) of all witness(es) whom you may call at trial.

35. State the name(s), addresses(es), and area of expertise of any expert witness(es) you intend to call in this case.

____
District Attorney

____
By Assistant District Attorney
Attorney for Plaintiffs

33D

EXHIBIT 10.9*

TRIAL OUTLINE FORM

Direct Examination of Mother (cover applicable questions only)

Prior to the actual courtroom appearance,the IV-D attorney (or staff person) should review the following questions with the mother. She should also be advised as to the nature of the questions likely to be covered during cross-examination by the defense. Such preparation is particularly important since paternity cases frequently are won or lost on the mother's ability to adequately present herself and her case.

1. Introductory Questions

   a. Name and address?
   b. Name, date and place of birth of child?
   c. Child's weight at birth (premature? overdue?)?
   d. Child's due date?
   e. Date of last menstrual period before pregnancy?
   f. Approximate date of conception?
   g. Identity of father?
   h. Birth certificate?

2. Marital History

   a. Marriage to defendant?
   b. Marriage of mother? When? Where?
   c. Marriage dissolved? How? When? Where?

3. Association with Alleged Father

   a. First meeting with defendant. When? Where? Circumstances?
   b. Frequency of dating and over what period of time?
   c. First sexual intercourse. When? Where?
   d. Frequency of intercourse and over what period of time?
   e. Specific indication of intercourse with defendant during conception period. Number of times, dates if possible?
   f. Were contraceptives used? If so, explain.
   g. Identity of hotels or motels, details of occupancy, manner of registration.
   h. If mother and defendant lived together, where? How long? Hold selves out as husband and wife?
   i. Intercourse by mother with any other men during a 30- to 45-day period before and after probable date of conception? With whom? When?

   (Note: In most cases, it is important to limit questions relating to intercourse with others to the period of conception. The issue is whether or not defendant is the father of the child; the mother's virtue is not on trial. If the IV-D attorney is careful not to open the door beyond the time of conception on direct examination, defendant's attorney will have

*Source: Paternity Case Processing Handbook, pp. 92-96.

to confine his questions to such time. However, tactics may direct that the mother's entire sex life be open to questioning, where the defense is claiming other men but the mother has no other illegitimate children, where the facts indicate no involvement with other men at any time and where strategy favors the mother proclaiming her virtue.)

4. Discovery of Pregnancy

   a. When?
   b. Identity of doctor and date of diagnosis.
   c. When was defendant told of pregnancy? What was said?

5. Admissions to Mother and Conduct by Defendant

   a. Admit being father to mother? When? Where? How many times? What said? Others present? Introduce any written admission in evidence.
   b. Offer marriage?
   c. Suggest abortion?
   d. Give money?
   e. Promise to support child?
   f. Visit mother in hospital?
   g. Take mother to or from hospital, clinic, doctor's office?
   h. Defendant sign birth certificate?
   i. Defendant suggest name of child?
   j. Continued intercourse after defendant informed he is father?
   k. Buy baby food, clothes?
   l. Give gifts to child? (Birthday, Christmas)
   m. Pay hospital bills?
   n. Any photographs of defendant and child? (Introduce in evidence.)
   o. Did defendant take photograph of child?
   p. Did mother give defendant photograph of child? At defendant's request?
   q. Any correspondence from defendant admitting or inferring paternity? (Introduce in evidence.)
   r. Any birthday cards from defendant to child?
   s. Visits by defendant to child---hold child? Play with child? What did defendant call child (e.g., "my son")?

6. Need for Support of Child

   a. Has mother indicated that she has custody and control of the child?
   b. Briefly indicate what the support needs are.
   c. How is support being provided at present? (Amount of welfare grant, if any.)

Resemblance

Jurisdictional case law should be researched to determine if comparison of child and defendant is allowed (or not disallowed). If so (and if there is a resemblance):

1. Have child and defendant stand or sit in front of the court or jury and show different views (such as profile).

2. Introduce evidence, photographs of child or defendant at earlier age.

3. Make sure unusual features are taken notice of by court or jury.

Blood Test Results

Introduce results into evidence by stipulation or through expert witnesses.

Other Witnesses

Corroborating witnesses are important in adding to the credibility of the mother's story, especially in jury trials. Corroborating witnesses will usually be used to testify to:

1. Admissions by defendant.

2. Visits to child by defendant.

3. Gifts to child by defendant.

4. Dating or relationship of mother and defendant at or near time of conception.

Support agreements may be introduced by member of IV-D staff witnessing the signing; support payments may be introduced by member of IV-D staff or public entity maintaining records.

Cross-Examination of Defendant

Cross-examination of the defendant will depend on the effectiveness and extent of his direct testimony. The following are questions that may be properly and effectively asked. Other questions should be added that diminish the defendant's actual testimony.

1. Are you acquainted with plaintiff? If the answer is affirmative:
    a. When and where did you first meet her? Describe fully the circumstances.

2. Did you visit her at her residence at ______________________________?
    a. When and under what circumstances did you first visit her at her residence?
    b. How many times did you visit her at her residence?

3. Did you ever kiss plaintiff? If so, when and where?

4. Did you ever have sexual intercourse with plaintiff?
    a. Did you have sexual intercourse with plaintiff at any time between ________________________ and ________________________?

b. If you did, where did said sex act or acts take place?

c. How many times and on about what dates did you have sex acts with plaintiff between ________________ and ________________?

5. Did you ever tell anyone that you had sexual intercourse or an affair with plaintiff?

a. If so, when, where, and to whom did you make the statement? What was said by you?

b. What did you say to your employer or others when plaintiff complained to them that you were the father of her child?

6. Did plaintiff telephone you on or about ________________ and inform you she was impregnated by you?

a. If so, what did you say to her? Please answer fully.

b. Did you tell her you were sterile and could not be a father?

(1) Did you ever consult a doctor to determine if you were sterile? If so, when and who?

(2) Do you now claim that you are sterile and could not be the father?

c. Did you receive from plaintiff further phone messages and letters to which you did not respond or answer? If so, why not?

7. Did plaintiff visit you on or about ________________________________ at __________________________?

a. Did you then offer to adopt the child? If so, why?

b. Did you give plaintiff any money? If so, how much and why?

c. Did plaintiff tell you she was surprised to find you then married?

d. Did plaintiff tell you she visited you in hope that you would marry her and legitimize the child?

e. Did you know at the time that she was claiming you were the father of her child?

8. Did you know of or have you heard of any man who claimed to have had sexual intercourse with plaintiff between ________________________ and ______________________?

a. If so, what are their names and addresses?

b. If so, what is the source of your information?

EXHIBIT 10.10*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
(child)____________________,by)
(next friend)______________,)
and)
(IV-D Agency)______________,)
Plaintiffs,)

vs.)
____________________________,)
Defendant.)
)

Case No. ________________

REQUEST FOR PRODUCTION
OF DOCUMENTS

COMES NOW plaintiff, (IV-D Agency)________________, and requests defendant, pursuant to Rule______, to allow plaintiff to inspect the following items:

(Set out items sought to be inspected either by individual item or by category with reasonable particularity.)

Plaintiff further requests said items be made available for inspection on or about (time)________________ at (place)________________.

____
Signature

The foregoing was mailed this
____________ day of _________,
19 __ to:

*Source: Missouri Prosecutor's Deskbook, Form 62-5.

EXHIBIT 10.11*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
(child) ____________________,by)
(next friend) ____________________,)
and)
(IV-D Agency) ____________________,)
Plaintiffs,)
)
vs.)
____________________________,)
Defendant.)
)

Case No. ________________

STIPULATION REGARDING BLOOD TESTS

COME NOW the parties to this action, and hereby stipulate and agree to the following:

1. The parties will present themselves, and (mother) ________________ will present herself and plaintiff (child) ____________________________, at a time and place to be arranged for the purpose of drawing blood samples.

2. Said blood samples shall be forwarded to (lab) ________________ for analysis to determine whether or not the defendant could be the father of plaintiff (child) ____.

3. Defendant shall pay all costs of blood analysis.

4. Test results shall be furnished to all parties as soon as available.

5. If said analysis shall exclude defendant from being a possible father of plaintiff (child) ________________________, then this action shall be dismissed, unless plaintiff (IV-D Agency) ________________________ agrees to fund additional blood tests.

6. Neither party will challenge the chain of custody of the blood samples, and neither party will move to suppress the test results based on their competency as evidence. Both parties agree to allow said results to be admitted without objection for whatever probative value they may have.

7. If the test results are disputed, the Court, upon reasonable request of either party, may order additional testing at the expense of the requesting party.

Date: __________________________
____
____
Attorney for Defendant

Date: __________________________
____
____
Attorney for Complainant

*Source: Missouri Prosecutor's Deskbook, Form 62-1.

EXHIBIT 10.12*

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
(child)______________________,by)
(next friend)_________________,)
and)
(IV-D Agency)_________________,)
Plaintiffs,)
)
vs.)
______________________________,)
Defendant.)
)

Case No. ________________

MOTION TO COMPEL BLOOD TESTS AND ORDER

COME NOW plaintiffs by their attorney, ____________________________, and move this court order pursuant to ______________________ that:

1. The mother of the minor plaintiff herein, defendant, and the said minor plaintiff submit to extended factor blood tests for the purpose of determining the probability of defendant's paternity of said minor plaintiff.

2. That the blood samples of said persons be drawn at

(location)______________________________ on (date)________________________.

3. That said blood samples be submitted to (name and address of lab)_____________________ for genotype analysis tests.

4. That defendant be ordered to pay all costs of the genotype analysis.

Respectfully submitted,

____
District Attorney

____
By Assistant District Attorney
Attorney For Plaintiff

A copy of this motion was mailed
this __________ day of __________,
19 ___, to all parties of record.

____

*Source: Missouri Prosecutor's Deskbook, Form 62-2.

EXHIBIT 10.13*

IN THE CIRCUIT COURT OF ______________ COUNTY
STATE OF ______________

State of ______________, ex rel.)
(child) ______________, by)
(next friend) ______________,)
and)
(IV-D Agency) ______________,)
Plaintiffs,)

vs.)
______________,)
Defendant.)
)

Case No. ______________

ORDER REGARDING BLOOD TESTS

Upon motion by plaintiff(s) and pursuant to Rule __________.

IT IS ORDERED:

1. That mother of the minor plaintiff herein, defendant, and the said minor plaintiff submit to extended factor blood tests for the purposes of determining the probability of defendant's paternity of said minor plaintiff.

2. That the blood samples of said persons be drawn at (location) ______________ on (date) ______________.

3. That said blood samples be submitted to (name and address of Lab) ______________ for genotype analysis tests.

4. That the defendant pay the ______________ the sum of $__________ as and for his share of the cost of said tests.

Dated: ______________

____
Judge

*Source: Paternity Case Processing Handbook, pp. 78-79.

EXHIBIT 10.14

IN THE CIRCUIT COURT OF ________________ COUNTY
STATE OF ________________

State of ________________, ex rel.)
(child) ____________________,by)
(next friend) ________________,)
and)
(IV-D Agency) ________________,)
Plaintiffs,)

vs.)
____________________________,)
Defendant.)
)

Case No. ________________

MOTION IN LIMINE

COME NOW plaintiffs and INFORM THE COURT as follows:

1. The above-captioned cause of action is ready for and will proceed to trial.

2. At trial, the relevant issues will concern defendant's paternity of plaintiff (child) ____________________.

3. Attorney for plaintiff is informed and believes that attorney for defendant intends to attempt to introduce evidence, or make reference to, or otherwise leave the jury with the impression (fill in as appropriate) ____.

4. It is immaterial and unnecessary to the disposition of this case and contrary to the law of this State to permit such evidence or inference and such evidence would be highly prejudicial to plaintiffs in the minds of the jury in that (reasons for prejudices) ____________________.

5. An ordinary objection during the course of the trial, even if sustained with proper instructions to the jury, will not remove such effect because (reasons for ineffectiveness) ____________________.

WHEREFORE, plaintiffs pray this court to exercise its discretion and make an order absolutely prohibiting defendant and his counsel from:

A. Referring to any other child or children to which (mother) ____________ may have given birth, whether legitimate or illegitimate.

B. Referring to any act of sexual intercourse between (mother) _______________________ and any other person other than defendant not occurring during the time period when in the course of nature plaintiff (child) _____________ could have been conceived.

C. Referring to (mother's) __________________ general reputation for chastity, virtue, or decency.

Respectfully submitted,

____
District Attorney

____
By Assistant District Attorney
Attorney for Plaintiffs

A copy of this Motion was mailed
to all parties of record this
_____________ day of ____________
19 __.

____
Attorney for Plaintiffs

EXHIBIT 10.15*

QUESTIONS FOR PROSPECTIVE JURORS

1. Have you ever served as a juror in any other case? If so, was it civil or criminal? Was a verdict reached?

    a. You may be nervous if this is your first time as a juror. Well, I do not know if it makes you feel any better, but I am nervous too, since this is my first jury trial as well.
    b. I am going to be asking you some very personal questions. If you are too uncomfortable or embarrassed to answer them in front of everyone, please tell me and perhaps we can go into the judge's chambers. I do not mean to embarrass you. If you do get a little embarrassed by these questions, you will not hold this against me, will you?

2. Do you all understand that there is a basic difference between a civil and a criminal case? In a criminal case, a defendant must be found guilty beyond a reasonable doubt. In a civil case, such as this one, you need only find that the evidence on which you base your decision is simply more convincing and has a greater likelihood of truth than any contrary evidence.

3. In other other words, do you all understand that if one side has $.51 worth of evidence and the other side has $.49 worth of evidence you must find for the side having $.51 even though that side is only $.02 richer?

4. Do you all understand that since 1976 Federal and State law requires the district attorney's office to establish paternity in cases in which a child is born out of wedlock?

5. And do you all understand that the mother of this child is not a plaintiff in the case, but the (IV-D Agency)__________________ is bringing the action on behalf of the State?

    a. Would the fact that the district attorney's office is bringing this action and not the mother prejudice you?

6. Either defense counsel or I may object to certain evidence during the course of this trial. Do you understand that neither of us are trying to hide anything from you?

    a. You will not speculate as to what the answer would have been or what the evidence objected to was, will you? You will decide the merits of the case on what evidence is presented, will you not?

7. It may appear that the parties, witnesses, or attorneys come from a particular national, racial, or religious group. They may also have a lifestyle different from your own. Would this in any way affect your judgment of the weight and credibility you give to their testimony?

*Source: Los Angeles, California, Deputy District Attorney Legal Manual, Vol. II, Establishment.

   a. Do you have any bias against (Spanish-speaking people)?

   b. Do you work with any? What is your relationship with them?

   c. How do you feel about people on welfare? Do you think people need it? Do you object to your taxes going to support welfare grants?

8. You will not be adversely influenced against me by the fact that (name of opposing counsel) is older and more experienced than I, will you?

9. Do any of you think that because the district attorney's office is involved the allegations are criminal rather than civil?

   a. If so, would that prevent you from following a different standard of proof? That is, would you require me to remove all reasonable doubt from your mind before you could render a verdict for the plaintiff?

10. Will you be able to follow the standard of proof on which the judge will give instructions even if it differs from the standard you think ought to apply?

11. Do all of you understand that your sole purpose in sitting on this jury is to decide the question of paternity?

12. Do any of you feel that it is morally wrong or sinful for a woman to engage in sexual intercourse outside of marriage?

13. Do you believe she is not trustworthy if she engages in sexual intercourse outside of marriage?

14. Is it worse for a woman than a man to engage in sexual intercourse outside of marriage?

15. Do any of you feel it is morally wrong or sinful for a woman to live with a man if she is not married to him?

16. Do any of you think that if a woman has sexual intercourse outside of marriage and then becomes pregnant, she should either have an abortion or give the child up for adoption?

   a. If so, can you put his belief aside for the purpose of this trial and decide the question of paternity, where the woman does have the baby and decides to keep it?

17. If you found that the defendant was the father, would this mean to you that you were also condoning the mother's conduct? In other words, if you are a person who thinks that a person should not have sexual intercourse outside of marriage or thinks that a child born out of wedlock should be put up for adoption, would you have a reservation finding the defendant to be the father because you do not want to condone what the mother did?

18. Do any of you believe that practicing birth control is solely the woman's responsibility?

19. Do any of you feel that if a woman does not use birth control the resulting pregnancy is her fault?

20. If it is her fault, does this mean the father should not bear some responsiblity?

21. Do any of you feel that if a woman decides not to have an abortion or put up the child for adoption, this relieves the father of his responsibility toward the child?

22. What if, at the time the mother became pregnant, the father did not want to have a baby?

23. Whose choice do you think it is whether to have the baby or not, the mother's or the father's or both their choice?

24. Would all of you be able to set aside the question of whose fault the birth of the child was, and simply decide based on the evidence before you, if the defendant is the father?

25. Do any of you have any fixed beliefs regarding the use of a blood test in paternity cases?

26. Do any of you believe that if a child is born out of wedlock and the father chooses not to acknowledge the child, the mother should simply leave the man alone and raise the child herself?

27. Do you think it would be better not to have a father at all than to have one who denied paternity of you?

    a. Would this belief prejudice you in finding the defendant to be the father if the evidence so indicates?

28, Do you believe that paternity is a private matter and should not be decided in a courtroom?

29. Do you feel that the (IV-D Agency)__________________ or the district attorney's office should not become involved?

30. Do any of you think that a child should be barred from having his or her paternity adjudicated simply because the child is no longer a baby?

31. The child in this case is (13) years old. Is there anything about this fact that bothers you or makes you uncomfortable? May we discuss it? Do you have any preconceived feelings because of this fact?

32. Are you suspicious because this suit is being brought (13) years after the birth of the child?

33. Can you think of any reasons why a mother might not want to go to trial and prove paternity at the time of her child's birth but later changes her mind?

    a. Do you think that if she does so, that after, say (7) years, she should be barred?

34. If an expert witness tells you that the defendant is unable to have children at the present time, what does this tell you about his condition (13) years ago?

    - (Nothing. That is correct because all the evidence you have before you is that of his condition today and not of his condition (13) years ago. Your job is to reach conclusions based only on the evidence.)

    a. If an expert tells you that a man is unable to have children now and the expert is unable to determine when this condition occurred, what does this tell you?

        - (Nothing. That is correct because all the evidence you have before you is that of his condition today and not of his condition at another time.)

    b. If you are satisfied the evidence shows that (name of mother)   had sexual intercourse with the defendant during the period of conception and that she did not have sexual intercourse with anyone else during this time, and you believe that the defendant is unable to have now or at any time other than the periods when this child was conceived, would you be able to find that he is the father of this child?

    c. If you do not learn why the defendant cannot have children, can you still find for the plaintiff or do you feel that it is my burden to answer this question?

35. Put yourself in my position. You need to obtain a fair jury. What about you or your background would you want to know that would indicate that you will be a good jury?

36. If I do not personally ask all of you questions, will you hold this against me?

37. If you were on trial here, would you want a juror like yourself?

38. Do you have any bumper stickers on your car? What do they say?

39. Do you realize that you can rely on your own common sense and experience with people in rendering your verdict?

40. Do any of you have any specific training in either law or medicine? Biology? Statistics?

    a. Do any of you have close friends or family who are involved in these areas?

b. Do you feel that you are familiar with any particular area? Which? Have you had any courses or training?

Nurses:	Prenatal? Obstetrics? Maternity work? Medical research?
Doctors:	Same
Teachers:	What grades have you taught? What subjects?
Engineers:	Do you do any statistical work?
Students:	Year in school? Major?

41. For those with children: Sons or daughters? Ages? Do they live at home? Are any of them married?

42. For those with teenagers: At what age do you think it is appropriate for your child to start dating? Is the age different for a boy than for a girl?

43. For grandparents: How often do you see your grandchildren? How old are they? Do they live in the same city as you?

44. For single people: Do any of you plan to have children?

45. Do any of you or do any of the members of your family receive child support payments?

46. Are any of you or do any of the members of your family pay child support? Who pays? To whom?

47. Is there anyone on this panel in whose family there has been a child born out of wedlock? Do you feel comfortable talking about it? Could we talk about it here, or would you feel better going into chambers?

    a. To whom was the child born?
    b. How long ago?
    c. What was the outcome? Adoption?
    d. Was the outcome satisfactory to you?

48. Have any of the members of your family had close friends involved in a paternity action?

    a. Who filed the action?
    b. When?
    c. Outcome?
    d. Outcome satisfactory?
    e. Can you keep that case separate from this one?

49. Do any of you or do any of your friends or family members have a case presently pending or have you had a case in the past where the district attorney's office was involved? Could we talk about it here, or would you rather do it privately in chambers?

    a. Type of case?
    b. Did the district attorney's office do a satisfactory job?
    c. Can you keep that case separate from this one?

50. Do any of you know of any reason, or has anything occurred during this question period that might in any way make you unsure or doubtful that you would be completely fair and impartial in this case?

    a. Do you realize that this system will be a complete failure if you hold back anything?

51. Are any of you acquainted with or related to the defendant ______________________________? If so, what is the nature of the acquaintance or relationship?

52. Are any of you acquainted with or related to defense counsel or any members of his/her firm? If so, what is the nature of the acquaintance or relationship?

53. Are any of you acquainted with or related to (mother)______________? If so, what is the nature of the acquaintance or relationship.

EXHIBIT 10.16*

IN THE CIRCUIT COURT OF _______________ COUNTY
STATE OF _______________

State of ________________, ex rel.)
(child) ______________________,by)
(next friend) _________________,)
and)
(IV-D Agency) _________________,)
Plaintiffs,)

vs.)
___________________________,)
Defendant.)
)

Case No. ______________

PLAINTIFF'S REQUESTED JURY INSTRUCTIONS

Plaintiff requests the following jury instructions from ____________:

AND

The attached plaintiff's proposed jury instructions.

DATED:

Respectfully submitted,

____
District Attorney

____
By Deputy District Attorney
Attorney for Plaintiffs

*Source: Los Angeles County Deputy District Attorney Legal Manual, Vol. II, Establishment

Plaintiff's Requested Instruction No. 1

RESPECTIVE DUTIES OF JUDGE AND JURY

Ladies and Gentlemen of the Jury:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, prejudice, or passion.

Authorities:

Plaintiff's Requested Instruction No. 2

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

If in these instructions any rule, direction, or idea is repeated or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point of instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

Authorities:

Plaintiff's Requested Instruction No. 3

STATEMENTS OF COUNSEL -- EVIDENCE STRICKEN OUT -- INSINUATIONS OF QUESTIONS

You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved [as to the party or parties making the stipulation or admission].

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you had never known of it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

Authorities:

Plaintiff's Requested Instruction No. 4

DIRECT AND CIRCUMSTANTIAL EVIDENCE -- INFERENCES

Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

Authorities:

Plaintiff's Requested Instruction No. 5

WEIGHING CONFLICTING TESTIMONY

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. The testimony of one witness worthy of belief is sufficient for the proof of any fact. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Authorities:

Plaintiff's Requested Instruction No. 6

FAILURE TO DENY OR EXPLAIN ADVERSE EVIDENCE

In determining what inferences to draw from the evidence or facts in the case against a party, you may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts.

Authorities:

Plaintiff's Requested Instruction No. 7

INTERROGATORIES

During the course of the trial you have heard reference made to the word "interrogatory." An interrogatory is a written question as by one party of another, who must answer it under oath in writing. You are to consider interrogatories and the answers thereto the same as if the questions had been asked and answered here in court.

Authorities:

Plaintiff's Requested Instruction No. 8

REQUESTS FOR ADMISSIONS

In this case, as permitted by law, the [plaintiff] [defendant] served on the [defendant] [plaintiff] a written request for the admission of the truth of certain matters of fact. You will regard as being conclusively proved all such matters of fact that were expressly admitted by the [defendant] [plaintiff] or that the [defendant] [plaintiff] failed to deny.

Authorities:

Plaintiff's Requested Instruction No. 9

CREDIBILITY OF WITNESS

You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case.

In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to the following:

- His demeanor while testifying and the manner in which he testifies;
- The character of his testimony;
- The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies;
- The extent of his opportunity to perceive any matter about which he testifies;
- His character for honesty or veracity or their opposites;
- The existence or nonexistence of a bias, interest, or other motive;
- A statement previously made by him that is consistent with his testimony;
- A statement made by him that is inconsistent with any part of his testimony;
- The existence or nonexistence of any fact testified to by him;
- His attitude toward the action in which he testifies or toward the giving of testimony;
- His admission of truthfulness.

Authorities:

Plaintiff's Requested Instruction No. 10

DISCREPANCIES IN TESTIMONY

Discrepancies in a witness' testimony or between his testimony and that of others [if there were any discrepancies] do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

Authorities:

Plaintiff's Requested Instruction No. 11

EXPERT TESTIMONY -- QUALIFICATIONS OF EXPERT

A witness who has special knowledge, skill, experience, training, or education in a particular science, profession, or occupation may give his opinion as an expert as to any matter in which he is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

Authorities:

Plaintiff's Requested Instruction No. 12

HYPOTHETICAL QUESTIONS

Questions have been asked in which an expert witness was asked to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

Authorities:

Plaintiff's Requested Instruction No. 13

JURY NOT TO TAKE CUE FROM JUDGE

I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest how you should decide any questions of fact submitted to you, or that I believe or disbelieve any witness.

If anything I have done or said has seemed so to indicate, you will disregard it and form your own opinion.

Authorities:

Plaintiff's Requested Instruction No. 14

ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE

The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case [including that of damages] must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict.

Authorities:

Plaintiff's Requested Instruction No. 15

JURORS TO DELIBERATE

When you go to the jury room it is your duty to discuss the case for the purpose of reaching an agreement if you can do so.

Each of you must decide the case for yourself, but should do so only after a consideration of the case with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way simply because a majority of the jurors, or any of them, favor such a decision.

Authorities:

Plaintiff's Requested Instruction No. 16

HOW JURORS SHOULD APPROACH THEIR TASK

The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges.

Authorities:

Plaintiff's Requested Instruction No. 17

EACH JUROR SHOULD DELIBERATE AND VOTE ON EACH ISSUE TO BE DECIDED

Each of you should deliberate and vote on each issue to be decided. However, before you may return a verdict [and special findings] to the court, at least nine or more identical jurors must agree on the verdict in its final and complete form [and, if your verdict is in favor of the plaintiff, on every answer required by the direction for special findings], so that each of those nine or more may be able to state truthfully that the verdict [and every answer] is his or hers.

Authorities:

Plaintiff's Requested Instruction No. 18

MANNER OF RECORDING INSTRUCTION OF NO SIGNIFICANCE -- CONTENT ONLY GOVERNS

The instructions which I am now giving to you will be made available in written form [if you so request] for your deliberations.

You will find that the instructions may be either printed, typewritten, or handwritten. Some of the printed or typewritten instructions may have been modified by typing or handwriting. Blanks in the printed instructions may have been filled in by typing or handwriting. Also, portions of printed or typewritten instructions may have been deleted by lining out.

You are not to be concerned with the reasons for any modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either what it was or what is the reason for the deletion.

Every part of the text of an instruction, whether it is printed, typed, or handwritten, is of equal importance. You are to be governed only by the instruction in its final wording whether printed, typed, or handwritten.

Authorities:

Plaintiff's Requested Instruction No. 19

CONCLUDING INSTRUCTION -- GENERAL VERDICT

You shall now retire and select one of your number to act as foreman who will preside over your deliberations. In this action, nine or more jurors may reach a verdict. [If your verdict is in favor of the plaintiff, you are also directed to make special findings of fact consisting of written answers to the questions in a form that will be given to you, in accordance with directions in that form and all the instructions of the court.] As soon as you have agreed upon a verdict [and, if your verdict is in favor of the plaintiff, nine or more identical jurors who have agreed upon the verdict in favor of the plaintiff have agreed upon every answer in the special findings, so that each of those nine or more may be able to state truthfully that the verdict and every answer in the special findings is his or hers], you shall have [it] [them] signed and dated by your foreman and then shall return with [it] [them] to this room. You will return any unsigned verdict form.

Authorities:

Plaintiff's Requested Instruction No. 20

BURDEN OF PROOF

In this action, the plaintiff has the burden of establishing by a preponderance of the evidence that the defendant, ______________, is the natural father of ____________________and ____________________________.

By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.

Authorities:

Plaintiff's Requested Instruction No. 21

JUDICIAL NOTICE

The Court has taken judicial notice of the normal period of gestation after which birth will normally occur. You are instructed that any fact or group of facts the Court has judicially noticed shall be accepted by you as a proven fact in this action.

Authorities:

Plaintiff's Requested Instruction No. 22

NORMAL GESTATION PERIOD

You are instructed that the normal period of gestation after which birth will occur is between 270 and 280 days after an act of sexual intercourse.

Authorities:

Plaintiff's Requested Instruction No. 23

GESTATION PERIOD

For purposes of this action to establish paternity of the minor child, ___________________, the period of probable conception is that period of time between ______________________ and including ______________________.

Authorities:

Plaintiff's Requested Instruction No. 24

PLAINTIFF'S VERDICT DIRECTOR NO. 1

If you find that the defendant and the mother in this case engaged in an act or acts of sexual intercourse at any time between ____________________ and _______________________ and if your further find that between __________________ and ____________________, the mother did not engage in sexual intercourse with any other man, you will find that defendant, _______________________, is the natural father of the minor child, ______________________________, who was born on ___________________.

Authorities:

Plaintiff's Requested Instruction No. 25

In this action to establish paternity of the minor child named in the complaint, a single act of sexual intercourse occurring during the period of probable conception is sufficient to warrant a finding in favor of the plaintiff.

Authorities:

Plaintiff's Requested Instruction No. 26

A certified certificate of live birth is prima facie evidence of the facts contained in the writing.

Prima facie evidence is defined as evidence good and sufficient on its face; such evidence as, in the judgment of the chain of facts constituting a party's claim, and which is not rebutted or contradicted will remain sufficient.

Authorities:

Plaintiff's Requested Instruction No. 27

A statement or a writing made by the defendant concerning the paternity of either or both children may be considered by the jury as an admission of paternity.

Authorities:

Plaintiff's Requested Instruction No. 28

If you find that after the plaintiff became pregnant with or after the birth of either the minor children in this case, (1) the defendant failed to reply or made an evasive answer to a statement concerning the paternity of either or both children; (2) that he heard and understood the statement; (3) that he had a reasonable opportunity to reply; (4) that he was in such physical and mental condition that he could reasonable be expected to reply; and (5) the statement was made under such circumstances that it would normally call for an answer, you may then consider whether his words or conduct indicated that he adopted the statement or believed it to be true, and consider the statement as an adoptive admission.

If you do not so find the preliminary facts, you will disregard any evidence of the party's silence or evasive answer.

Authorities:

Plaintiff's Requested Instruction No. 29

You have been given the opportunity of comparing the appearance of the plaintiff, the defendant, and the minor children. You, the jury, were entitled to this opportunity to compare appearances.

Authorities:

Plaintiff's Requested Instruction No. 30

If you find that there is a reputation among defendant's family members or (mother's)________________ family that defendant is (child's)______________ father, this reputation may be evidence that defendant is in fact (child's)____________________ father.

Authorities:

Plaintiff's Requested Instruction No. 31

You are instructed that a paternity action may be filed at any time while the child is a minor.

The fact that the trial herein is occurring when the child(ren) is(are) __________________ years old must not prejudice you in your deliberations or in your verdict.

Authorities:

Plaintiff's Requested Instruction No. 32

The State of __________________________ is authorized to bring civil actions to establish paternity and for child support, on behalf of a minor child, and such actions shall be filed by the District Attorney.

Authorities:

Plaintiff's Requested Instruction No. 33

The fact that a public entity, ____________________________, is a party in this action must not prejudice you in your deliberations or in your verdict. You may not discriminate between a public entity and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standards.

Authorities:

Plaintiff's Requested Instruction No. 34

You are instructed that the mere possibility of another man being the father of the minor child will not support a verdict for the defendant.

Authorities:

Plaintiff's Requested Instruction No. 35

You should disregard any evidence of sterility unless you believe that the evidence produced shows that it is more likely than not that the defendant was sterile between ____________________ and _____________________.

Authorities:

APPENDIX A
Legislative History Of Child Support Enforcement

1950

Congress passed the first Federal child support enforcement legislation by adding Section 402(a)(11) to the Social Security Act [42 USC 602(a)(11)], requiring State welfare agencies to notify appropriate law enforcement officials upon providing Aid to Families with Dependent Children (AFDC) with respect to a child who was abandoned or deserted by a parent.

Also that year, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Reciprocal Enforcement of Support Act (subsequent amendments to this Act were approved in 1952, 1958, and 1968).

1965

Public Law (P.L.) 89-97 allowed a State or local welfare agency to obtain from the Secretary of Health, Education, and Welfare, the address and place of employment of an absent parent who owed child support under a court order for support.

1967

P. L. 90-248 allowed States to obtain from IRS the addresses of absent parents who owed child support under a court order for support. In addition, each State was required to establish a single organizational unit to establish paternity and collect child support for deserted children receiving AFDC. States were also required to work cooperatively with each other under child support reciprocity agreements and with courts and law enforcement officials.

1975

After 3 years of Congressional attention to child support enforcement issues, P.L. 93-647 was signed into law on January 4, 1975, creating, *inter alia*, Part D of Title IV of the Social Security Act [Sections 451, *et seq.*; 42 USC 651 *et seq.*]. The child support enforcement provisions of P.L. 93-647 are, in brief, as follows:

- The Secretary of Health, Education, and Welfare, now the Department of Health and Human Services (DHHS), has primary responsibility for the Child Support Enforcement Program and is required to establish a separate organizational unit to operate the program. Operational responsibilities include (1) establishing a parent locator service; (2) establishing standards for State program organization, staffing, and operation to assure an effective program; (3) reviewing and approving State plans for the program; (4) evaluating State program operations by conducting audits of each State's program; (5) certifying cases for referral to the Federal courts to enforce support obligations; (6) certifying cases for referral to the IRS for support collections; (7) providing technical assistance to States and assisting them with reporting procedures; (8) maintaining records of program operations, expenditures, and collections; and (9) submitting an annual report to the Congress.

- Primary responsibility for operating the Child Support Enforcement Program is placed on the States pursuant to the State plan. The major requirements of a State plan are that (1) the State designate a single and separate organizational unit to administer the program; (2) the State undertake to establish paternity and secure support for individuals receiving AFDC and others who apply directly for child support enforcement services; (3) child support payments be made to the State for distribution; (4) the State enter into cooperative agreements with appropriate courts and law enforcement officials; (5) the State establish a State parent locator service that utilizes both State and local parent location resources and Federal Parent Locator Service; (6) the State cooperate with any other State in locating an absent parent, establishing paternity, and securing support; and (7) the State maintain a full record of collections and disbursements made under the plan.

- Procedures for the distribution of child support collections received on behalf of families receiving AFDC were set out.

- Incentive payments to States for collections made on AFDC cases were created.

- Monies due and payable to Federal employees became subjected to garnishment for the collection of child support.

- New eligibility requirements were added to the AFDC program, which required each applicant for, or recipient of, AFDC to make an assignment of support rights to the State; to cooperate with the State in establishing paternity and securing support; and to furnish his or her social security number to the State.

The effective date of P.L. 93-647 was to be July 1, 1975, except for the provision regarding garnishment of Federal employees, which became effective on January 4, 1975. Several problems were identified prior to the effective date though and Congress passed P.L. 94-46 to extend the effective date to August 1, 1975. In addition, P.L. 94-88 was passed in August, 1975, to allow States to obtain waivers from certain program requirements under certain conditions until June 30, 1976, and to receive Federal reimbursement at a reduced rate. This law also eased the requirement for AFDC recipients to cooperate with State child support enforcement agencies when such cooperation would not be in the best interests of the child. It also provided for supplemental payments to AFDC recipients whose grants would be reduced due to the implementation of the child support enforcement program.

1976

Effective October 20, 1976, State employment agencies were required to provide absent parents' addresses to State child support enforcement agencies (P.L. 94-566).

1977

P. L. 95-30, effective May 23, 1977, made several amendments to Title IV-D:

- Provisions relating to the garnishment of a Federal employee's wages for child support were amended to (1) include employees of the District of Columbia; (2) specify the conditions and procedures to be followed to serve garnishments on Federal agencies; (3) authorize the issuance of garnishment regulations by the three branches of the Federal Government and by the District of Columbia; and (4) define further certain terms used.

- Section 454 of the Social Security Act (42 USC 654) was amended to require the State plan to provide for bonding of employees who receive, handle, or disburse cash and to insure that the accounting and collection functions be performed by different individuals. The incentive payment provision, under section 458(a) of the Social Security Act [42 USC 658(a)], was amended to change the rate to 15 percent of AFDC collections (from 25 percent for the first 12 months and 10 percent thereafter).

The Medicare-Medicaid Antifraud and Abuse Amendments of 1977 (P.L. 95-142), effective on October 25, 1977, established a medical support enforcement program, under which States could require Medicaid applicants to assign to the State their rights to medical support. State Medicaid agencies were allowed to enter into cooperative agreements with any appropriate agency of any State, including the IV-D agency, for assistance with the enforcement and collection of medical support obligations. Incentives were also available to localities making child support collections for States and to States securing collections on behalf of other States.

1978

The Bankruptcy Reform Act of 1978 (P.L. 95-598), which was signed into law on November 6, 1978, repealed Section 456(b) of the Social Security Act [42 USC 656(b)], which had barred the discharge in bankruptcy of assigned child support debts. The Federal Bankruptcy Act was subsequently repealed as of October 1, 1979, and replaced by a new uniform law on bankruptcy. Section 456(h) of the Social Security Act was reenacted by section 2334 of P.L. 97-35.

1980

Section II of P.L. 96-178 extended until March 31, 1980, Federal Financial Participation (FFP) for non-AFDC services, retroactive to October 1, 1978.

The Social Security Disability Amendments of 1980 (P. L. 96-265) were signed into law on June 9, 1980, increasing Federal matching funds to 90 percent, effective July 1, 1981, for the costs of developing, implementing, and enhancing approved automated child support management information systems. Federal matching funds were also made available for child support enforcement duties performed by certain court personnel. In another provision, the law authorized the use of the IRS to collect child support arrearages on behalf of non-AFDC families. Finally, the law provided State and local IV-D agencies access to wage information held by the Social Security Administration and State employment security agencies for use in establishing and enforcing child support obligations.

The Adoption Assistance and Child Welfare Act of 1980 (P. L. 96-272) contained four amendments to Title IV-D of the Social Security Act. The law made FFP for non-AFDC services available on a permanent basis. It allowed States to receive incentive payments on all AFDC collections as well as interstate collections. Third, as of October 1, 1979, States were required to claim reimbursement for expenditures within 2 years, with some exceptions. The fourth change postponed until October, 1980, the imposition of the 5 percent penalty on AFDC reimbursement for States not having effective child support enforcement programs.

1981

The Omnibus Reconciliation Act of 1981 (P.L. 97-35) added five amendments to the IV-D provisions. First, IRS was authorized to withhold all or a part of certain individuals' Federal income tax refunds for collection of delinquent child support obligations. Second, IV-D agencies were required to collect spousal support for AFDC families. Third, for non-AFDC cases, IV-D agencies were required to collect fees from absent parents who were delinquent in their child support payments. Fourth, child support obligations assigned to the State no longer were dischargeable in bankruptcy proceedings. Finally, the law imposed on States a requirement to withhold a portion of unemployment benefits from absent parents delinquent in their support payments.

1982

The Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248) was signed into law on September 3, 1982, and included the following provisions, which affected the IV-D program:

- FFP was reduced from 75 to 70 percent, effective October 1, 1982. Incentives were reduced from 15 to 12 percent, effective October 1, 1983. The provision for reimbursement of costs of certain court personnel costs that exceed the amount of funds spent by a State on similar court expenses during calendar year 1978 was repealed.

- The mandatory non-AFDC collection fee imposed by P.L. 97-35 was repealed, retroactive to August 13, 1981. P. L. 97-248 allowed States to elect not to recover costs, or to recover costs from collections or from fees imposed on absent parents. Another provision clarified States' authority to collect spousal support in certain non-AFDC cases.

- As of October 1, 1982, members of the uniformed services on active duty were required to make allotments from their pay when support arrearages reach the equivalent of a 2-month delinquency.

- Also beginning October 1, 1982, States were allowed to reimburse themselves for AFDC grants paid to families for the first month in which the collection of child support is sufficient to make a family ineligible for AFDC.

The Omnibus Budget Reconciliation Act of 1982 (P.L. 97-253), effective September 8, 1982, provided for the disclosure of information obtained under authority of the Food Stamp Act of 1977 to various programs, including State child support enforcement agencies.

Title X of the Uniformed Services Former Spouses' Protection Act (P.L. 97-252), signed into law on September 8, 1982, treats military retirement or retainer pay as property to be divided by State courts in connection with divorce, dissolution, annulment, or legal separation proceedings.

1984

The key provisions of P.L. 98-378, the Child Support Enforcement Amendments of 1984, require critical improvements to State and local child support enforcement programs in four major areas:

- Mandatory Practices

  All States must enact statutes providing for the use of improved enforcement mechanisms, including (1) mandatory income withholding procedures; (2) expedited processes for establishing and enforcing support orders; (3) State income tax refund interceptions; (4) liens against real and personal property, security or bonds to assure compliance with support obligations; (5) reports of support delinquency information to consumer reporting agencies. In addition, State law must allow for the bringing of paternity actions any time prior to a child's eighteenth birthday, and all support orders issued or modified after October 1, 1985, must include a provision for wage withholding.

- Federal Financial Participation and Audit Provisions

  The Act encourages greater reliance on performance-based incentives by reducing Federal matching funds by 2 percent in Federal fiscal year 1988 (to 68 percent) and another 2 percent in fiscal year 1990 (to 66 percent). Federal matching funds at 90 percent are available for the development and installation of automated systems to improve required procedures, and, for the first time, computer hardware purchases can be matched at this higher rate. The Gramm, Rudman, Hollings legislation may impact these percentages.

  Starting October 1, 1985, States will receive an incentive minimum of 6 percent for both AFDC and non-AFDC collections. These percentages can increase to as much as 10 percent for both categories for very cost-effective States, but a State's non-AFDC incentive payments are limited by the amount of incentives available for AFDC collections. The law further requires States to pass incentives through to local child support enforcement agencies where these agencies have participated in the costs of the program.

  The Act modifies the requirement of auditing each State annually to one of auditing each State at least once every 3 years. The Act also alters the focus of the audits to the extent that, beginning with the FY 86 audit period, States' effectiveness will be evaluated on the basis of program performance as well as operational compliance. Graduated penalties of from 1 to 5 percent of total payments to the State under the AFDC program may be imposed if a State is found not to have complied substantially with Federal requirements over successive periods. However, the penalty may be suspended if the State opts to take corrective action, over a maximum period of 1 year, to come into substantial compliance.

- Improved Interstate Enforcement

  The proven enforcement techniques discussed above must be applied to interstate cases as well as intrastate cases. Both States involved in an interstate case will be allowed to take credit for the collection when reporting total collections for the purpose of calculating incentives. In addition, the law authorizes OCSE to commission special demonstration grants beginning in fiscal year 1985, to be made available to States to fund innovative methods of interstate enforcement and collection. Federal audits will also focus on States' effectiveness in establishing and enforcing obligations across State lines.

- Equal Services for Welfare and Nonwelfare Families

  The Act amends section 451 of the Social Security Act to provide that Congress, by creating the Child Support Enforcement Program, intended to aid both nonwelfare and welfare families. In addition, the Act contains several specific requirements directed at improving State services to nonwelfare families. All of the mandatory practices discussed above must be made available for both classes of cases; the interception of Federal income tax refunds is extended to nonwelfare cases; incentive payments for nonwelfare cases will be available for the first time; when families are terminated from the welfare rolls, they automatically must receive nonwelfare support enforcement services without being charged an application fee; and States must publicize the availability of nonwelfare support enforcement services.

- Other Provisions

  In addition to those provisions identified above, the Act requires that States (1) collect support in certain foster care cases; (2) collect spousal support in addition to child support where both are due in a case; (3) notify AFDC recipients, at least yearly, of the collections made in their individual cases; (4) establish State commissions to examine, investigate, and study the operation of the State's child support system and report findings to the State's governor; (5) formulate guidelines for determining appropriate child support obligation amounts and distribute the guidelines to judges and other individuals who possess authority to establish obligation amounts; (6) offset the costs of the program by charging various fees to nonwelfare families and to delinquent absent parents; (7) allow families whose AFDC eligibility is terminated as a result of the payment of child support to remain eligible to receive Medicaid for 4 months; and (8) seek to establish medical support orders in addition to monetary awards. In addition, the Act also makes the Federal Parent Locator Service more accessible and effective in locating absent parents. Sunset provisions are included in the extension of Medicaid eligibility and Federal tax offsets for non-AFDC families.

APPENDIX B

Scientific Testing For Paternity Establishment

INTRODUCTION

The problem of disputed parentage and the search for ways to resolve it are not new. Japanese folklore of the 12th century describes methods for dealing with genealogical controversy: "In those times any person claiming to be an heir to an estate was required to undergo a blood test. The finger of the individual making the claim was pricked and a drop of blood was permitted to drip on the skeleton of the deceased. If the blood soaked in, the claim was upheld."[1] In still another test, two persons who claim to be related were required to allow drops of their blood to drop into a basin. Their relationship was recognized only if their respective drops of blood merged in the basin.

Tests used to establish or disprove relationship have grown increasingly sophisticated over the years. In particular, tests of the paternal relationship have profited from the scientific advancements of the last 25 years. Today, the possibility of excluding a falsely accused man is greater than 90 percent and is sometimes as high as 99 percent.

It is fortunate both for children and for the men who father them that these advances have been made in the science of genetic identification. Today, the paternity trial is more than a credibility contest. Evidence is available--and widely used throughout the court system--that minimizes the guesswork involved in determining the parentage of a child. If a man is falsely accused of fathering a child, genetic testing can prove his innocence 99 percent of the time, depending on the content of testing. Moreover, this conclusive and readily available evidence is relatively inexpensive, especially when the cost of blood tests (usually no more than $400 for a full battery of tests, which is not always necessary) is balanced against the cost of supporting a child for a period of 18 years.

In addition, tests which indicate that a man may have fathered a particular child may be interpreted further to determine the likelihood that he did father the child in question. While statistical estimates of plausibility, or "inclusionary" evidence, are not accepted as widely throughout the court system as determination of exclusion are, these estimates are extremely reliable. In particular, when considered together with other evidence of relationship, genetic evidence of this kind can turn an essentially subjective determination into a far more objective and verifiable proceeding.

This appendix discusses the genetic basis of paternity testing and reviews the tests most often used for paternity establishment, which include the red blood cell antigen, the human leukocyte antigen, and the red cell enzyme and serum protein tests (more commonly referred to as electrophoresis). A description of the technology used in the tests and the strength of the testing results also is provided.

Other issues examined include various approaches for determining and expressing probability rates (the likelihood that a man is the father of the child); standards for blood testing laboratories as specified by the American Association of Blood Banks (AABB), and current research on technology for paternity testing.

THE GENETIC BASIS OF PATERNITY TESTING

A basic understanding of the laws of heredity is needed to comprehend how genetic principles are applied to parentage testing. All human traits are determined by genes inherited from both parents, including both red and white cell blood types. At conception, the mother's egg, which contains 23 chromosomes, combines with the 23 chromosomes contained in the father's sperm. As a result, the child inherits 46 chromosomes which are paired in 23 sets. Within each set, one chromosome is inherited from the mother and one from the father. These chromosomes contain the genetic markers that determine all inherited characteristics. Since children inherit half of their genetic markers from their mother and half from their father, deductions can be made regarding which genetic markers are paternal in nature when the mother's and child's genetic markers are known. Because the components of human blood contain many of these inherited and identifiable genetic markers, it is possible to use blood tests to determine parentage.

Of course, it is possible for a man who is not the biological father of a particular child to possess genetic markers that appear in the child. However, it is extremely unlikely that he will possess by sheer chance a large number of genetic markers that appear in the child. For this reason, paternity blood tests examine independent groups (or "systems") of genetic markers in the blood of the child, mother, and alleged father.

Knowing the variations in any one marker that are present in the blood of the mother and the child, one can specify the range of variations that may appear in the blood of the biological father. If the variations observed in the blood of the alleged father do not fall within this range, he may be excluded from paternity.

When the blood of the alleged father contains the genetic markers that are required to be present in the blood of the biological father, he cannot be excluded from paternity. Moreover, because gene frequencies have been determined for diverse populations, specialists can predict with great accuracy the likelihood that a given man actually is the biological father of a child, and not just someone who happens to share the same blood characteristics with an unrelated individual.

Other factors that make the identification of genetic markers very effective in paternity determination are as follows:

- They are expressed at birth or shortly thereafter.
- They remain stable through life and are unaffected by extrinsic factors such as age, illness, diet, etc.
- They can be identified relatively easily through scientific tests which allow both accurate and reproducible identification.[2]

The scientific techniques that have been developed can provide statistically reliable data necessary to establish a child's parentage. Consequently, the scientific testing has transformed the paternity establishment process from a credibility contest to a conclusive, fact-oriented proceeding.

RED BLOOD CELL ANTIGEN TEST

At the beginning of this century, Dr. Karl Landsteiner's discovery of the ABO blood group system provided the basis for paternity testing as we know it today. As additional blood group systems such as MNSs, Rh, Kell, Duffy, and Kidd were discovered, the potential use of blood groups in paternity establishment increased. While these systems are commonly referred to as "blood groups," the term technically refers to antigens present on red cell membrane to which the body reacts by producing antibodies.

In testing blood group systems, red blood cells are exposed to a specific antibody under controlled conditions, and the cells then are examined for a reaction of the antigen to the known antibody. The absence or presence of the antigen is determined according to the absence (negative reaction) or the presence (positive reaction) of agglutination (clumping). A laboratory technician can determine whether a reaction has occurred by examining the antigen-antibody mixture in the test tube over a magnifying mirror.[3]

For example, when testing the ABO system, a reagent which contains the known antibodies that will react to A, B, AB, and O red blood cells are introduced to the antigen on the red blood cell. Group A red blood cells will react only to anti-A antibodies; group B red blood cells will react only to anti-B antibodies; group AB red blood cells will react to both anti-A and anti-B antibodies; and group O red blood cells will react to neither. Similar test procedures are used with the other blood group systems. Since the reactions that should occur when specific antigens are present on the red blood cells are known in the medical field, a laboratory technician can determine the typing of the antigens.

Unfortunately, red blood cell antigens are not distributed in the population with sufficient variation to allow medical experts to draw valid conclusions regarding the probability of an individual's paternity. Consequently, if the red blood cell antigen test does not provide exclusionary evidence (data that determines that the man is not the father of the child), the statistical probability of inclusion of parentage (likelihood that the man is the father of the child) is not admissible in evidence. As a result, the use of red blood cell antigen test results was limited to exclusionary evidence for many years.

While the red blood cell antigen test is not self-standing for purposes of inclusionary evidence, both the medical and legal communities recommend that the test should be performed first when testing for paternity determination. If a man can be excluded in this way, no further tests are required. The red blood cell antigen test is relatively simple to perform and inexpensive in comparison to other testing procedures. Moreover, if exclusion cannot be established at this first stage, the test results can be incorporated with those of additional tests to obtain inclusionary evidence.

RED CELL ENZYME AND SERUM PROTEIN TEST

Tests which are gaining increasing respect as a reliable scientific measure for parentage determination are the red cell enzyme and serum protein tests. Serum is a complex solution containing a number of proteins; these proteins are composed of amino acids, each of which has a slight electrical charge. As with blood cell structures, the information for the production of these proteins is determined genetically.

Placed in an electric field, proteins will migrate at a rate proportional to their electrical charge and size. The rate of migration can be controlled by varying the medium--the denser the medium the slower the migration of large proteins. By selecting the appropriate current and medium, a wide range of proteins can be separated. Electrophoresis is the procedure used to separate protein molecules based on their size and electrical charge. In practice a small amount of sample is placed on an electrophoresis plate along with known standards and the current applied for a prescribed length of time. The plate is then stained to reveal the location of the various proteins and the migratory distance of the unknown is compared to a standard to identify the genetic type.[4/]

The reasons for interest in this testing are many. The migration patterns which are measured and compared to known standards are easy to read. In addition the slides can be dried, which allows a permanent record and physical evidence which can be presented in court by an expert witness. An additional advantage to using this type of testing is that rare variants can be identified through their migration rate, so there is no extra labor involved in locating them. Assume, for example, that a rare variant is found 1 in 1000 times in a system (a not unreasonable assumption). If one is testing 10 systems, a rare variant in one of the systems will occur 1 in 100 times. If this variant is passed on to the child, parentage is relatively assured.[5/]

As in other types of testing, new protein systems that have fairly evenly distributed gene frequencies are being discovered . Some of the more common systems in use now are phosphoglucomutase (PGM), adenosine deaminase (ADA), esterase D (EsD), 6-phosphogluconate dehydrogenase (6-PGD), and group-specific component (Gc). As new systems are being added, the red cell and serum protein tests are becoming more powerful as probability rates for both exclusion and inclusion are increasing.

Blood testing laboratories are finding that if a man is not the father of a child, the chance of his being excluded on the basis of this test runs anywhere from 80 to 85 percent. However, if the testing results are combined with those of the red blood cell antigen test, the exclusionary rate is between 89 and 96 percent. Because the cost of performing enzyme and serum protein testing can be half that of HLA testing and because the test results are becoming more accurate as new systems are discovered, serum protein testing is becoming more popular with the medical and legal communities.

Since the technical procedure used for this testing is quite different than that used for the red blood cell antigen test and the HLA test which will be discussed later, technicians require specialized training to perform this test. Furthermore, laboratories must have specific equipment. Consequently, many laboratories in this country still do not have the facilities or resources to perform electrophoretic testing. However, more laboratories have or are in the process of obtaining this technical expertise in order to provide it as part of their battery of tests.

HUMAN LEUKOCYTE ANTIGEN TEST

In principle, HLA testing is similar to red blood cell antigen identification since it involves a reaction of all surface antigens to a specific antibody. However, the antigens tested are those found in the white blood cells (leukocytes) as well as all nucleated cells, rather than antigens found on the red blood cell. HLA structures are of primary importance in matching donors to recipients for organ transplantation. For this reason, they also are known as tissue antigens, transplantation antigens, or histocompatibility antigens. Like an individual's red blood cell antigen types, the white blood cell antigen types are genetically controlled.

Four subclasses of antigens are used to define an individual's tissue type. The genes coding for each white blood cell antigen type used in HLA testing are found at three closely linked locations (or loci) on the sixth pair of chromosomes. They are termed HLA-A, HLA-B, and HLA-C. At conception, an individual inherits one complete set of genes (A, B, C), known as a haplotype, from each parent. By testing the white blood cells for the presence of antigen markers determined by gene codes at the HLA-A, B, and C loci, technologies can determine the phenotype of the individual tested. From the pheonotype, the genotype (the haplotype derived from the individual parents) can be inferred.[6]

In HLA testing, the white blood cells are exposed to known antibodies and reactions of the antigen-antibody mixture are observed to determine the identity of the antigens. While agglutination is the reaction observed in red blood cell antigen test, cytotoxicity or cell death is the reaction observed in the HLA test. More specifically, human leukocyte antigens are tested by separating the white cells from whole blood to determine the specific ability of an antibody to kill the white cell. This testing is performed by separating the white cells from the other cells and mixing them together with known antibodies and complement (which is important for the reaction). After appropriate incubation, reactions are detected microscopically using a dye as an indicator. If there is dye inside the white cells, they have been killed since cell walls become permeable on death, and foreign substances (such as dye) can enter the cell. If the cells remain alive, they are intact, and the dye cannot penetrate the cell. Approximately 180 antibodies exist, including at least two antibodies for each antigen tested. Therefore, 180 separate tests per person must be completed to reach a conclusion as to the actual tissue type of an individual.

There are several drawbacks to HLA testing. As mentioned earlier, for complete typing for HLA, serological and genetic analyses of the antigens require at least 180 antibodies, which makes the procedure labor-intensive. In addition, the reagents necessary for the test are rare, so the entire process is quite expensive. Furthermore, the blood must be analyzed within 24 to 72 hours after it is drawn because the cells will die if they are not separated rapidly from the blood. Consequently, most HLA typing is confined to a relatively few large facilities.

The major advantage of HLA testing is that it is very polymorphic (i.e., genetically rich). The large number of markers in each of the three gene groups (alleles) A, B, C is so great that a large number of variations occur in the population. Moreover, any one variation has a very low frequency of occurrence. Consequently, HLA is a valuable test not only for exclusionary purposes, but for inclusionary purposes as well. "If the red blood cell antigen tests fail to exclude the alleged father and if his leukocyte variations match those of the child, it can be shown that he is a member of a class of, say 2 percent of the population that could have fathered the child--or stated another way, that there is a 98 percent chance that he fathered the child. If other factors, such as access to the mother, are taken into account, the question of paternity can be resolved under law."[7] Using the HLA test alone, it is possible to exclude over 90 percent of falsely accused men and to indicate those men who are highly likely to be the biological father. Combined with the red blood cell antigen test results, the percentage can be as high as 99 percent.

NEW TECHNOLOGY FOR PATERNITY TESTING

The three types of testing most often used in paternity establishment (red blood cell antigen testing, HLA, and the enzyme and protein test) all involve analysis of genetic markers that represent inherited genetic characteristics rather than looking directly at a person's genetic makeup. One system being studied for paternity testing that is linked more closely to direct genetic composition is the chromosome banding test. In this procedure, approximately 10 white blood cells are selected for study and cultured in flasks. Different staining techniques reveal the chromosome bands. Differences in banding patterns are usually present in four to six of the 46 chromosomes in each cell. These patterns are heritable. "The chances of excluding a man who is wrongly accused as the father of a child with the chromosome banding method probably approach 100 percent."8/

Another testing procedure currently in the research stage is deoxyribonucleic acid (DNA) probes. This new technique looks directly at a person's genetic composition, DNA. In simplified form, the process works as follows: "The DNA is extracted from white blood cells and divided into pieces by means of a specific enzyme, a chemical scissors that cuts the DNA only at specific sites. The number of these sites present in an individual's DNA dictates the number and size of DNA fragments generated by the enzyme. When this process is repeated with several enzymes, each of which cuts at different sites, enough information is gathered to construct a detailed genetic fingerprint of a person. Paternity is then determined by comparing the accused man's genetic fingerprint with that of the child."9/

The advantages of these new methods is that no two people have the same genetic make up (except identical twins). Thus, it is hoped that as the procedures are perfected, they will be more accurate than any currently available. Presently, however, neither the chromosome banding nor the DNA probe method have passed the test of legal acceptance. Furthermore, both methods are expensive and not readily available. However, as research continues, and as other genetic factors are being tested for their appropriateness in paternity testing, it seems possible that both exclusionary and inclusionary rates will increase dramatically in the future.

GUIDELINES FOR PATERNITY BLOOD TESTING

In 1976, a joint committee of the American Medical Association (AMA) and the American Bar Association (ABA) recommended guidelines for paternity blood testing. These guidelines are directed toward obtaining meaningful exclusionary or inclusionary evidence, and take into account the relative advantages and disadvantages--as well as the resolution power--of each technique discussed. Based on their findings, the committee concluded the following:

> It is not the intent to recommend in all medico-legal problems of disputed parentage that the entire set of tests is mandatory. It is often possible to establish exclusion with the basic blood group systems (ABO, Rh, and MNSs). When these basic tests do not allow exclusion, extended testing may be done (using Kell, Duffy, and Kidd systems) to increase the mean probability of exclusion to the 63 to 72 percent level. If no exclusion is found, testing by human leukocyte antigens or electrophoresis should proceed until at least 90

percent, but preferably, 95 to 99 percent, of all wrongly accused men are excluded.[10].

Exhibit A, which outlines the available methods of paternity testing discussed earlier, supports the AMA/ABA guidelines. To increase efficiency, paternity tests are taken sequentially, using first an approach that yields a 90 percent or better chance of exclusion.

- The combination of red cell antigens with enzymes and proteins has substantially the same efficiency of exclusion as the combination of red cell antigens with HLA; each provides a likelihood of exclusion of greater than 90 percent.

As the table indicates, use of all systems yields a probability of exclusion of 99 percent. However, it is neither practical nor efficient to utilize all three groups routinely for the following reasons:

- The different groups of tests utilize different skills and techniques. At present, very few laboratories offer all the systems.
- The cost of testing all systems and the inconvenience of submitting specimens to several laboratories is considerable.

Regardless of whether one starts with red cell antigens plus enzymes and proteins, or white cell antigens (HLA), exclusion of a falsely accused man will be made 90 percent of the time. If the tests used indicate a sufficiently high probability of paternity, no further testing may be required. If the results are inconclusive, further analyses may be desirable. Use of all tests will result in an overall exclusion of 99 percent as indicated by the table.

INTERPRETATION OF PATERNITY TEST RESULTS

As recommended by the AMA/ABA, laboratories should be able to exclude at least 90 percent of falsely accused men based on test results. In general, laboratories that specialize in paternity testing advertise the strength of their tests according to Probability of Exclusion (P.E.)--that is, the probability that a given test or combination of tests will exonerate a falsely accused man. The Probability of Exclusion should not be confused with Probability of Paternity, which is a statement expressing the likelihood of paternity in a particular case. They are independent concepts and are mathematically unrelated.

Every genetic system has an associated P.E. For the ABO system, the P.E. is roughly .17; for MNs, it is .32, etc. For HLA, it ranges from .88 to .92, depending upon the number of different test antibodies used. "The HLA test is the best single system in terms of having the largest P.E., but is not the best test. The best test would be one which would give a total P.E. of better than 99 percent. In fact, any combination of systems which can give a total P.E. of .88 to .92 would equal the HLA test in the ability to detect falsely accused men."[11] Thus, two separate laboratories may use the same techniques in testing but have different P.E.s depending on the level of testing. Consequently, when selecting laboratories and methods of testing, paternity workers

Exhibit A

SUMMARY OF AVAILABLE METHODS OF PATERNITY TESTING*

Group	Systems	Experimental Technique	Probability of Exclusion Using Systems In Group		
Enzymes and Proteins	AcP, AD, EsD, Bf, Gc, Hp, PGM, Tf, GPT, 6-PGD, ADA	Electrophoresis	.70 - .85		
				.91 - .97	
Red Cell Antigens	ABO, Rh, MNSs, Kell, Duffy, Kidd A & B	Agglutination	.63 - .72		.99
				.91 - .99	
White Cell Antigens	HLA-A, HLA-B	Complement-Mediated Cytotoxicity	.85 - .91		

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* Reprinted from "Blood Testing," OCSE TEMPO 4: U.S. Department of Health and Human Services, April 15, 1980. This summary is taken in large part from a pamphlet prepared by Paternity Testing Laboratory, Department of Pathology, Memorial Hospital Medical Center of Long Beach, California, and reprinted with the permission of Jeffrey Morris, M.D., Ph.D. No official support or endorsement of the laboratory or any one blood testing group, system, or technique by the Office of Child Support Enforcement, DHHS, is intended.

should base their selection on the P.E. that the laboratory offers, rather than the method of testing implemented.

Exclusionary Methods

While absolute proof of paternity cannot be established by scientific testing, exclusion of paternity is considered absolute if results are based on direct exclusion (Class I) or on indirect exclusions (Class II). Direct exclusion refers to testing results which demonstrate that the child possesses a genetic marker lacking in both parents. For example, in using the ABO system, a direct exclusion is obtained when the child types as B, and both the biological mother and alleged father type as O. Since neither the mother nor the alleged father can contribute the B gene (and there are almost no exceptions to this rule), this information constitutes a direct exclusion and is considered adequate evidence for nonparentage.

Indirect exclusions are obtained if the child does not possess a genetic marker that he or she should have received if either parent was homozygous (the two genes in a pair being identical) for this marker. For example, in using the MNSs system, the mother may type as an MN, the alleged father as an M, and the child types as an N. The child would appear homozygous for the N gene, which the father appears to lack. In addition, the alleged father appears homozygous for the M gene which the child lacks. However, the alleged father may possess the rare gene Mg which the laboratory could detect only by using a specific reagent that would demonstrate the rare factor and distinguish between the homozygous state (exclusion) and the presence of the rare factor in the child and the alleged father (nonexclusion).[12] Often, these reagents are not available, and laboratories resort to testing other systems that may reveal direct exclusion.

Thus, the distinction between direct and indirect exclusion is that in direct exclusion, the child carries a genetic marker which is not demonstrated in either the biological mother or the alleged father, while indirect exclusion is based on an assumption that either of the parents is homozygous. While people may appear homozygous, genetic abnormalities may produce inaccurate results. Gene mutations, recombination of unexpressed genes that leave unexpressed antigens, are examples of rare factors that would require additional testing with the specific reagents that are often not readily available. Consequently, many laboratories find it necessary to find exclusion in at least two different genetic systems before excluding parentage with confidence. Multiple system exclusions are always desirable and are necessary for an unqualified statement of exclusion when indirect exclusions are involved.

Inclusionary Methods

When a man is not excluded from parentage, statistical calculations can reveal the Probability of Paternity (sometimes referred to as the likelihood or plausibility of paternity). How the calculations are made is perhaps the most controversial issue in the paternity testing field because there are several methods of calculations used. Each method is based on a different premise, though each premise is itself mathematically sound.

Prior probability. The most often used calculations in paternity testing are based on Bayes' Theorem, a mathematical statement about the effect new information has on previously held beliefs about "chances." This method relates the probability of an item (alleged father) with certain attributes (genetic markers) being a member of a particular group (biological father) to the probability that a known member of the group would have the same attributes.

The most often used calculations use a neutral prior probability--that is, that a random man and the alleged father had an equal opportunity to father the child. The rationale for using a neutral prior probability rate is that an impartial laboratory should not assess the value of nongenetic information. Since the laboratory has no knowledge of the evidence, most laboratories assign a neutral estimate of 0.5 from a scale of 0-1 (ranging from impossible to certain) which is indicative of a particular event having occurred. The Essen-Moller calculation (the one recommended by the AMA), and the Hummel modification, which expresses the likelihood of paternity in a percentage, both imply a neutral prior probability.

This impartial calculation has implications for the paternity worker. Blood testing laboratories are not privy to all the information on a particular case and cannot weigh the laboratory results relative to other factors. The person who can evaluate the case is the worker and/or attorney who has been working directly with the mother and the alleged father. Consequently, the paternity worker must be able to recognize special situations in which this parameter of prior probability has a greater or lesser meaning.

The Neyman-Pearson Theory argues that weighed prior probability is appropriate. The following example supports weighed prior probability: "A bite is inflicted in a blackout in Times Square. Given the nature of the two animals, a tiger is more likely to bite one than a dog; but tigers are much scarcer in Times Square. While the probability that a dog would bite one is less than 1 percent, and would lead to rejecting the null hypothesis that the miscreant was a dog, it does not lead the rational mind to decide that, after all it probably was a tiger."13/

As shown, there are pros and cons in using both weighed and neutral prior probability. Perhaps a statement by Hummel best explains why a neutral prior probability rate is recommended by AMA/ABA:

> Equality before the law requires that if a man denies a child's allegation that he is the child's father, these two claims must be treated as equal. The probability of his being the father is the same as that of not being a father. Accordingly, in cases involving one man the prior probability of paternity should be 0.5. The legal philosophy behind this prior probability cannot be challenged so long as the legal rights asserted by the child are valued as highly as those defended by the man.14/

Calculation of probability of paternity. As mentioned previously, there are numerous methods that can be used in calculating inclusionary evidence. The following is an explanation of the method recommended by the AMA/ABA and which assigns neutral prior probability:

The paternity index is a calculation which estimates the possibility that the tested man might be the father of the child. The paternity index indicates how many men of the same background as the alleged father would have to be tested to find another man who could be the father of the child. Several factors are taken into account when determining this number. First, each of the genetic systems that can be passed on by the alleged father to the child are tested. In other words, what needs to be determined is whether the alleged father's sperm have all the necessary characteristics to pass on to the child in question. If so, the calculation needs to consider whether all his sperm or only some have the necessary characteristics. The answer to this question will depend on whether the man is homozygous or heterozygous.

The gene frequency is based on how many men of similar ethnic background as the alleged father would have to be tested to find another man who could be the father of the child in a random population. Gene frequency tables are based on laboratory tests of several thousand individuals that have been selected at random, and are calculated for racial populations. Typically, these tests are done in paternity cases (from blood donors, etc.) and are compared with other laboratories.

To illustrate how this calculation is computed, first assume that if the alleged father is homozygous, his genotype is AA. This means that all his sperm have the necessary characteristics to pass on the A gene 100 percent of the time. If he is heterozygous, his genotype being AO, his sperm have the appropriate characteristics to pass on the A gene 50 percent of the time.

X = chance of sperm having A
If a man is AA (homozygous), X = 1
If a man is AO (heterozygous), X= .5

The next step in determining the paternity index is to calculate how frequently another man at random also will be able to contribute the A gene that the child has--that is, if such a person were to have had a sexual relationship with the mother, how often would this occur. For example, assume that the frequency of the A gene occurs in a random population 25 percent of the time. Therefore, the other characteristic, 0, occurs with a frequency of 75 percent. If an A gene has a 25 percent change of occurring, and A is the characteristic we are testing for, we would determine the ratio of X (the chance of the sperm having A) over Y (the frequency that A occurs in the random population). When the man is homozygous, X = 1, and if A has a frequency of 25 percent, one divided by 25 percent or X over Y equals 4. If, on the other hand, the man is heterozygous, then X = .5, and X divided by Y would be equal to 2.

X = chance of sperm having A
Y = gene frequency for A

If A = .25, therefore O = .75

If X is 1.0 (man is homozygous)
1/.5 or X/Y = 4

If X is .50 (man is heterozygous)
.50/.25 or X/Y = 2

This calculation is done for each specific system since the true biological father of the child must contribute all the paternal genes, and, of course, the alleged father is able to pass each such gene to his offspring. In order to determine the paternity index, the resulting numbers from each system tested (each X/Y) are then multiplied together.[15]

The paternity index reflects the number of random men who would have to be tested in order to find another man who could have fathered the child in combination with the mother. The paternity index number is used to determine likelihood value of paternity. The likelihood value of paternity is calculated by dividing the paternity index number and the paternity index number plus 1 and multiplying by 100 to get a percent (e.g., P1/P1+1 x

100). The calculation gives a percent basis of how many more times it is likely that the man who has been tested could be the father versus some man picked at random who has not been tested.

This method of calculating probability of paternity is employed by the majority of parentage testing laboratories in the United States and Europe, and it is the method most familiar to the American court system. However, there has been some criticism. For example, Dr. Mikel Ackin argues that "the [probability] figure is not, in fact, the probability that the alleged father is the true father." In addition, he maintains that assumptions (sometimes self-contradictory) affect the denominator of the likelihood ratio used in the calculation and that speculation about genotypes that does not constitute scientific evidence are used in post inclusionary calculation. Dr. Aikin's arguments against paternity probabilities originally appeared in an article entitled "Some Fallacies in the Computation of Paternity Probabilities," published in the American Journal of Human Genetics.[16] Appendix C includes a summary of his argument and a rebuttal to the original article by Dr. Richard H. Walker.

SELECTING A BLOOD TESTING LABORATORY

When selecting a blood testing laboratory, the foremost consideration is whether the laboratory performs a sufficiently detailed series of tests to exclude most wrongfully accused men. The AMA/ABA Guidelines recommend a rate of 90 to 95 percent. Furthermore, in cases where an exclusion is not achieved, the persuasiveness of the inclusionary evidence is tied directly to the probability of exclusion that has been rendered by the battery of tests. In addition, one should not rely solely on a lab's advertisement that it performs both HLA and enzyme/protein tests. The probability of exclusion is tied to the number of factors and variations tested within each category of testing; different labs test different numbers and combinations of factors. There are other considerations as well, and these are discussed below.

Ability to handle required volume. The IV-D agency should determine in advance whether the lab can support the anticipated volume of work. Procedures and protocol at blood testing labs can be matters of significance during paternity trials, and the agency must make sure that the lab understands its needs in this area.

Provide service at a reasonable cost. Generally, labs that perform red blood cell enzyme and serum protein tests are less expensive than labs that perform HLA tests. The relatively flexible handling requirements for the enzyme and serum samples permit one to use labs anywhere in the country.

Provide expert testimony in selected cases. Expert testimony can be required during disputed paternity trials. In most States, extremely few paternity cases go to trial. Blood test reports can be particularly useful in encouraging a negotiated settlement. In the estimated five or six percent of disputed cases which finally must be tried, it is highly advantageous to have medical evidence available showing the likelihood of paternity based upon genetic resemblance of the accused father and the child.

Provide effective quality control procedures. The lab's method of certifying and reporting test results also should be agreed upon in advance. Such practices as duplicate testing for key factors by different technicians should be encouraged and discussed if they are performed. Test reports that list all tests performed and provide detailed discussions of any factor that may result in an exclusion should be required. If no exclusion is achieved, test reports should include calculations of the probability that a wrongly-accused man would have been excluded, and possibly a calculation of the probability of paternity based on the test results. Expert testimony, either in person or by deposition, also should be available.

Provide adequate chain of custody. Chain of custody refers to the possession and control of the blood samples from the time they are drawn until the time the blood is analyzed. Selecting a lab requires careful inquiry concerning methods used to identify the parties and procedures used to label and seal blood specimens. Adequate precautions should be taken at every stage of the proceeding to lessen the risk of basing results on the wrong samples.

PROCEDURES FOR BLOOD TESTING LABORATORIES

The clinical laboratory plays an important role in cases of disputed parentage. Because of the legal aspects of scientific testing, precautions must be taken to ensure that the test results will be admissible as evidence in court. Consequently, such tests must be conducted with accepted techniques by qualified personnel and in such a way as to ensure the correct identification of the parties involved. Also, the chain of custody must be documented properly. The procedures followed by some laboratories are outlined below.

Step 1: Referring. Most laboratories will not perform any testing unless a case is referred by a lawyer, physician, judge, or an appropriate welfare agency.

Step 2: Scheduling. There are two alternatives to scheduling the parties to a paternity case for drawing the blood to be tested. The first alternative, if convenient, is to have everyone appear at the same time, to identify each, and to witness the drawing, labeling, and sealing of the blood specimens. The second alternative is to have the alleged father arrive before the mother and child to avoid any unpleasant scenes. If the second alternative is selected, the alleged father typically should be photographed before any blood is drawn and asked to sign his photograph before a witness. Some laboratories also take thumb prints. When the mother and child come to have their blood drawn, the mother should be asked to identify the alleged father and initial his photograph.

Step 3: Verifying the donor's identity. Regardless of which alternative is selected for scheduling blood tests, samples can be obtained, confirmed, and labeled so there is not doubt later whether the samples were drawn from the right individual. At least 2 pieces of identification (such as a driver's license, social security card, or birth certificate) should be required from all parties.

Prior to obtaining the blood samples, laboratory staff should counsel all parties to explain the procedure and the implication of the results. Appropriate consent forms should be completed, and a photograph and thumb print of each party should be obtained for the purposes of identification and later court use if necessary.

Step 4: Drawing the blood specimen. Blood must be drawn in sufficient quantity for the particular tests to be performed. Most blood typing procedures require only miniscule amounts of blood. Because it is difficult to obtain any significant volume of blood from a newborn infant (the child's veins are too small to locate), many laboratories require that a child be at least 6 months old and in good health before they will attempt to obtain a blood sample. In addition, a child under 6 months may possess maternal genetic markers which were transmitted across the placenta while the child was in the uterus. A similar situation occurs when a person receives a blood transfusion. A laboratory should ask a donor if he or she has had a transfusion and how long ago the transfusion occurred; a blood specimen should not be taken unless 3 months have elapsed since the transfusion.

If the laboratory performing the test was not responsible for drawing the blood, it is extremely important that the samples are labeled and sealed immediately after venipuncture and withdrawal. For the convenience of the parties, it is not at all uncommon for the blood to be drawn at a local hospital or physician's office and then shipped to the testing center. The major problem this imposes is that the blood must arrive in a condition suitable for analysis and chain of custody must be documented carefully. For HLA testing, this usually means delivery within 24 hours. The red blood cell components are hardier and can be tested several days after the blood is drawn. If non-HLA testing is performed, the blood may be delivered to the laboratory by ordinary mail. In fact, many laboratories provide insulated mailing containers for this purpose. It is recommended, however, that blood always should be drawn and shipped early in the week to avoid any unnecessary delay caused by storage over the weekend. Also, there must be no possibility of tampering with the specimens or confusion with others stored in the same area. These precautions should be standard operating procedures in a laboratory experienced in the handling of blood for paternity testing.

Step 5: Documenting the chain of custody. The chain of custody is initiated by the person obtaining the specimen and should be maintained by each succeeding person who handles it. Specimens are marked for identification by each person who handles them. Each exchange of a specimen from one person to another should be documented by both according to a specified protocol. A single chain-of-custody form accompanying the specimen should be used to record all of the above-described transactions. Many laboratories have prepared written procedures and designed forms to document the chain of custody, and each link in the chain of custody may be documented and proven by affidavit. These safeguards lessen the chance that the chain of custody will be challenged in court.

Until recently, child support enforcement programs had no guidelines or set standards to follow in the selection of a blood testing laboratory. However, in May of 1984 the American Association of Blood Banks (AABB) released their "Standards for Parentage Testing Laboratories." These standards apply to areas of personnel, policies, collection and identification of specimens, red blood cell antigen testing, HLA testing, red cell enzyme and serum protein testing and reports and calculations.

The personnel and policies section addresses the qualifications of the director and technical staff of the laboratory. It also covers various other aspects of the laboratory such as size, competency of staff, safety codes, storing and handling of reagents and blood specimens, testing methods, proficiency testing programs, use of reference laboratories, consulting with outside sources, and the development of a manual detailing all procedures and policies utilized by the laboratory.

The collection, identification, and documentation section specifies documentation vital to the legal and general laboratory aspects of the case, and requires the confidential maintenance of all case records. The standards for blood tests require the red blood cell antigen testing to be performed in duplicate, by different technicians utilizing at least two reagents from different sources for each antigen tested. Each HLA test must be plated on two separate trays or tray sets, each containing a minimum of one monospecific or two multispecific sera defining HLA-A and B antigens. These trays must be read independently. The tests for the red cell enzymes and serum proteins also must be read independently by two different technicians.

The reporting and calculations section requires that the information provided to the requesting agency be sufficient to permit an understanding of the results with a minimum of difficulty.

In May 1982, the Office of Child Support Enforcement sponsored a forum to resolve of genetic test calculation issues.[17] More than 40 experts from 7 foreign countries and the United States convened at the International Conference on Inclusion Probabilities in Parentage Testing. The Conference was organized by the Committee for Parentage Testing of the American Association of Blood Banks. Attendees were selected for their knowledge and expertise in areas related to the calculation of parentage testing and included geneticists, statisticians, and lawyers. As a result of the Conference, uniform guidelines were established for reporting estimates of probability of paternity. These guidelines are included in Exhibit B. In addition, AABB standards were developed to assure any party involved in a paternity dispute that high quality laboratory standards were established and used. Any laboratory involved in paternity testing is eligible to request accreditation by the AABB. Once accredited, laboratories are reviewed annually. As a result of these new standards, much laboratory accreditation work is now being performed by AABB.

FOOTNOTES

/1/ American Association of Blood Banks, Paternity Testing (New Orleans, LA: American Association of Blood Banks, 1978), p. vii.

/2/ Howard Bragdon, Medical Technician, et al., "Parentage Evaluations: A Biological Analysis for the Legal Profession" (Nashville, TN: Dia Clin Laboratory, Inc.), p. 5.

/3/ Baltimore Rh Typing Laboratory, Inc., "Genetic Markers Inheritance Paternity Rh Laboratory-Solution" (Baltimore, MD).

/4/ Bragdon op. cit., p. 12.

/5/ B.A. Myhre, M.D., Ph.D., "The Use of Genetic in Parentage Testing" (unpublished manuscript).

/6/ Baltimore Rh Typing Laboratory, Inc., op. cit.

/7/ Joel S. Kolko, "Admissibility of HLA Test Results to Determine Paternity," The Family Law Reporter, Monogr. 2, Vol. G, No. 15 (February 15, 1983).

/8/ The Oregon Health Sciences University, Special Laboratory Services, "Paternity Testing" (Portland, OR).

/9/ Madeline Chinnici, "Ultraprecise Paternity Test," Science Digest (December 1984), p. 22.

/10/ American Medical Association/American Bar Association, "Guidelines for Paternity Blood Testing" (Washington, DC: 1976).

/11/ Henry Gershowitz, Ph.D., "A Guide to Paternity Testing," National Legal Laboratories (Okcemos, MI).

/12/ Bowman Gray School of Medicine of Wake Forest University, "Policies and Procedures for Medicolegal Blood Testing in Cases of Disputed Parentage" (Wake Forest, NC: November 1982).

/13/ Wilma B. Bias, Ph.D., et al., "Theoretical Underpinnings of Paternity Testing," Inclusion Probabilities in Parentage Testing (Arlington, VA: American Association of Blood Banks, 1983), p. 57.

/14/ K. Hummel, "Gesellschaft for Forensische Blutgruppenkunde, e.v." Paper presented at 8th International Congress of the Society for Forensic Haemogenetics (London: September 1979), p. 237.

/15/ Basic statistical theory holds that the combined probability of a string of independent events is determined by multiplying their individual probabilities. For example, if event A occurs once every 4 days at random, and event B occurs once every 4 days at random, the chance of choosing a random day and having both events occur is 1/4 X 1/4 or 1/16.

/16/ Mikel Aickin, Ph.D., "Some Fallacies in the Computation of Paternity Probabilities," American Journal of Human Genetics 36: 904-915, 1984.

/17/ Richard H. Walker, M.D., ed., Inclusion Probabilities in Parentage Testing (Arlington, VA: American Association of Blood Banks, 1983). (Symposium of the Airlie Conference held at the Airlie House, Virginia, May 1982.)

Exhibit B

GUIDELINES FOR REPORTING ESTIMATES OF PROBABILITY OF PATERNITY*

1. Testing of genetic markers in cases of disputed parentage should include multiple systems which will exclude most falsely accused men. If tests fail to exclude the alleged father, an estimate of the probability of paternity should routinely be calculated from the observed phenotypes of the mother, child, and alleged father.

2. One estimate that the nonexcluded alleged father could be the biologic father is a likelihood or odds ratio known as the Paternity Index (PI;X/Y). This compares the alleged father (X) with a random man (Y) in terms of their respective probabilities of providing an appropriate gene to the child in each of the genetic systems for which phenotypes have been determined.

3. The estimate of probability derived from the phenotypes of the mother, child, and alleged father should also be stated as a percentage expression (Probability value: W value; Likelihood; Plausibility; Relative Chance of Paternity). Since calculations to determine this estimate include a value for the prior probability, reports must state the prior probability(ies) used.

4. Other mathematical expressions may be derived from the observed phenotypes or other data. If they are included in the report, such expressions should be defined and explained.

5. Probability calculations should consider the racial origin of the mother, alleged father, and the random man. Gene frequencies should have been obtained by the examination of populations of adequate size. In some cases it may not be feasible to compare the alleged father with a random man because relevant and adequate gene frequency tables are not available.

6. Mathematical expressions of probability estimates may be accompanied by verbal predicates. If used, verbal predicates should be explained in the report.

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* Richard H. Walker, M.D., ed., Inclusion Probabilities in Parentage Testing (Arlington, VA: American Association of Blood Banks, 1983), p. xiv.

APPENDIX C

Paternity Probabilities: Attack and Rebuttal

RESERVATIONS ABOUT THE PATERNITY PROBABILITY

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Samaritan Health Service

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The victim of a hit-and-run incident testifies that he is certain that he remembers one letter and one number on the license plate of the car that hit him. He reports that the last of the three letters was A, and the last of the three numbers was 3. He cannot recall the other letters and numbers. The woman charged in the case drives a car with plate JKA 123. The prosecuting attorney presents an expert witness who testifies that on the basis of this evidence alone, the probability that the accused woman committed the hit-and-run is .9962, or 99.62%.

The computation is simple. If the woman is guilty, then the probability that her plate would match the recall of the victim is 1, or 100%, because the victim is so sure of his testimony. On the other hand, if the woman is innocent and was in effect selected for accusation at random, then the probability that her plate would match the victim's description is 1/260. This latter figure is calculated by observing that the chance of a matched letter is 1/26, the chance of a matched number is 1/10, and since the two outcomes are independent, their probabilities may be multiplied to form the chance of their joint occurrence. Finally, we compute the guilt index by dividing the former probability by the latter (GI = 260) and then the probability of guilt by the formula PG = GI/(1+GI) = .9962.

The expert witness testifies that the calculation is mathematically correct (it follows from Bayes' Theorem) and based on empirical facts (the Department of Licenses reports that except for a very small fraction of vanity plates, all letters and all numbers are equally likely on a randomly chosen license plate). He may also report that it is methodologically identical to the paternity probability calculation that was popularized in the 1970s and has come to be accepted in many courts.

Although this little example may appear to have no relationship to paternity, it is true that virtually all experts in the area of paternity testing are agreed that the fundamental logic of the preceding probability calculation is sound. To a few of us, however, it seems as though the paternity probability, like the above probability of guilt, risks overstating the evidence on which it is based, and we have expended some modest effort in trying to explain why this is so.

Direct v. Circumstantial Evidence

Direct evidence is evidence that, if believed, requires no further argument in order to establish the fact at issue. If the victim had seen the face of the woman as she drove the car that hit him and had recognized her in court, this would be direct evidence.

Circumstantial evidence is evidence that, if believed, does require a further argument in order to establish the fact at issue. The victim's partial recall of a license plate matching that of the accused woman is circumstantial evidence. That a particular man is genetically capable of having produced a given child is also circumstantial evidence.

The probability of guilt claims to be direct evidence. After all, if a scientifically determined probability of the woman's guilt is .9962, then it would be irrational to argue that she is innocent. The probability of paternity also claims to be direct evidence.

The conclusion must be that the reasoning behind the probability calculation provides the additional argument necessary to transform circumstantial into direct evidence. It is necessary to examine this reasoning before accepting the argument.

What Do Scientists Do?

The problem of determining whether a given man is the father of a given child bears similarity to the medical problem of deciding whether or not a given individual suffers from a particular disease. In each case there are two alternatives (he is the father or he isn't; the subject has the disease or doesn't), and a test is available that behaves differently depending on that of the alternatives is true.

This being so, it is informative to discover how the medical profession handles the diagnostic problem. The methodology is well-developed and consists of carrying out a study in which a number of individuals known to have the disease are tested, and then a second group of individuals known not to have the disease are similarly tested. The figures reported from such a study are the "true positive rate," which is the fraction of all nondiseased individuals who test negative. To the extent that these two rates are high, the test is regarded as being a valid indicator of the presence or absence of disease, and its results are relied on.

The logic is quite simple. No matter whether the person has the disease or not, the test has a large probability of correctly signifying the presence or absence of disease, and therefore we should accept its conclusion. No probability of disease or nondisease need be computed, because to do this computation (using Bayes' Theorem) requires an assumption (the prior probability of disease) that is less closely connected to the particular person than are the test results.

In paternity testing, the true negative rate is called the probability of exclusion (PE), which is the probability that a nonfather would be excluded by the blood tests. Because of advances in identifying multiple systems, it has become possible to design a battery of tests with true negative rates above .99.

The true positive rate is so seldom discussed in the paternity testing literature that it does not have a special name. It has probably never appeared on any laboratory report, and there is some question whether a typical serological laboratory even knows what the true positive rates of its tests are.

The reason for this may be that the true positive rate (probability of not excluding a true father) is implicitly regarded as 100%. Among the possible arguments that a lower figure is more appropriate are (1) the possibility of mutations or other genetic anomalies and (2) the lack of perfect reliability of blood tests.

As to the first, the probability of a mutation is regarded as being very small and is typically neglected. However, since one often encounters small probabilities in paternity calculations, this does not seem to be a sufficient reason to ignore it.

The second is more important, because it may involve larger probabilities and may be less accurately known. Some laboratories do not publicly admit any error rate in their tests, while some others report rates of 1% to 1.5%. It is usually unclear what the rates refer to or how they are ascertained. This point is of some significance, because it seems unreasonable for a laboratory whose test reliability (on a per case basis) is 98.5% to report paternity probabilities in excess of this figure.

It is to be emphasized that the true positive and negative rates are not only properties of the serological tests but also of the laboratories that carry them out.

One final advantage of true positive and negative rates is that it is possible to obtain accurate empirical estimates of them apart from any reference to paternity disputes and with a minimum of assumptions about population genetics. In order to empirically validate paternity probabilities it would be necessary to mount a costly and very difficult direct study of paternity cases themselves. It is unlikely that this will ever be done.

In addition to the assessment of its own internal error rates, a laboratory should be required to adhere to the same guidelines that are customarily imposed in blinded clinical studies. Many laboratories, perhaps most of them, do not do this.

Comparison of Probabilities

Granted that the production of a paternity probability based on genetic evidence is a worthy goal, there are some choices among methods by which it could be calculated. The customary paternity probability calculation is one method, but it is worthwhile to consider at least one alternative.

A key ingredient of the paternity probability is the probability that a man of the alleged father's phenotype would, in conjunction with a woman of the mother's phenotype, produce offspring with the child's phenotype. We shall call this the joint offspring probability of the mother and alleged father.

This probability is easy to compute but difficult to interpret by itself. What is required is some other probability (or probabilities) with which it can be compared. It would seem to be apparent that the most relevant probabilities for comparison would be the joint offspring probabilities of other men who might plausibly be considered as possible fathers. If blood from these other plausible fathers could be drawn, then their joint offspring probabilities could be compared to those of the alleged father, and a probability of paternity be established for each man. This would use the Bayesian methodology that has been accepted by paternity testers. It would provide a complete set of genetic evidence for the computation of paternity probabilities.

Nearly all paternity probabilities are obtained without this complete set of evidence. The comparison probability that is actually calculated is the probability that a woman of the mother's phenotype would produce offspring of the child's phenotype. We shall call this the mother's offspring probability. In order to get around the difficulty that the true father's phenotype would be unknown in this case, it is assumed that the father's genes were obtained by a random draw from some large population. This is generally called the "random man" hypothesis.

Consider these figures from an actual case. The joint offspring probability of the mother and alleged father was .006, and the mother's offspring probability was .00007.

The paternity index (PI) was then .006/.00007 = 85.7, and the paternity probability was 85.7/86.7 = .989.

It was extremely unlikely in this case that the alleged father produced the child (.006), but the paternity probability was high (.989). The reason it was high is that, even though the chance of the alleged father producing the child was small, the probability of a "random man" having produced it (.00007) was much smaller. Comparing these probabilities by forming their ratio (85.7) led to the result.

The crux of the issue is whether this comparison is reasonable. Paternity testers argue that if the alleged father were not the true father, then the only reasonable way to compute the mother's offspring probability is by a genetic random draw. Although this argument is true as far as it goes, it does not address the question whether the most reasonable calculation one can carry out is sufficiently reasonable to form the basis of a judgment. It does not weigh the cost of obtaining the blood types of the other plausible fathers against the risk of producing a misleading probability without them. Actual Bayesian decision-making would take these costs and risks into account and could lead to the conclusion that further evidence is required before a decision should be reached. Paternity testers use a simplified version of Bayesian methodology that ignores this issue.

Responsible paternity testers have repeatedly emphasized that additional factors need to be considered in conjunction with the paternity probability, but it is not clear that their warnings find much expression in its day-to-day application. Some proponents of the paternity probability would evidently go so far as to say that once it reached some very high value, the introduction of additional evidence becomes unnecessary. This amounts to asserting that genetic evidence alone is sufficiently complete for a judgment, which is a determination that properly belongs in the sphere of law, not genetics.

If the paternity tester's rationale for computing the PI ratio were generally acceptable, then it would not be particularly difficult to convert circumstantial evidence into direct evidence in a wide variety of situations. The reason is that if one computes the probabiity of an outcome using much evidence (a proximal probability) and then recomputes it using little evidence (a distal probability), then the former will virtually always be larger than the latter.

In trying to forecast human events, if one takes enough aspects of a situation into account, then all possible outcomes are unlikely. Even the outcome that eventually happens would have been given a small distal probability. However, as one draws closer to the event and becomes aware of more and more of its aspects, the proximal probability of the actual outcome becomes larger.

Thus, once we know that the alleged father is not excluded from paternity, we can calculate a joint offspring probability (proximal) that will nearly always be much larger than the mother's offspring probability (distal). The difficulty that arises when Bayesian methods are applied to proximal and distal probabilities has been raised as an objection to routine, unconsidered employment of these methods.

On the other side, the comparison of proximal and distal probabilities only becomes an issue after the alleged father has not been excluded from paternity. It is a powerful theoretical property of genetic testing that it should have large true positive and true negative rates. Once the accused man has not been excluded, there is clearly genetic evidence that he is the true father. Nevertheless, there does not seem to be any overpowering reason to follow a legitimate test (finding that the accused man is not excluded) by a further test that inappropriately compares proximal and distal probabilities.

Probabilities Without Evidence

The most persistent objection that non-Bayesian statisticians have brought against Bayesian methods is that the Bayesian must at some point introduce (prior) probabilities based on no evidence. The Bayesian counterargument is that, as empirical evidence accumulates, the choice of the prior probabilities has a negligible influence on the final decision.

The paternity testers assign prior probability of .5 to each of the two alternatives, that the alleged father is the true father or that he is not. They justify this by saying (1) that any other assignment of prior probabilities favors one side or the other and (2) that the actual fraction of mothers who correctly identify fathers is higher (3 of 4), so that the alleged father cannot complain that the prior disfavors him.

With regard to the first justification, we have seen that a complete genetic analysis of paternity would consider all plausible fathers, and it seems reasonable that an assignment of prior probability that is fair to all of them would give each the same prior probability of being the true father. The paternity tester's adoption of a .5 prior for the alleged man is equivalent to the assumption that there is only one other plausible father. No doubt this is reasonable in some cases, but again one needs to ask whether it is better to assume only one other plausible father or to actually find out how many there are. What this point illustrates is that it is very difficult to produce a paternity probability that is based strictly on genetics, with no further nongenetic assumptions.

With regard to the second justification, it is fairly clear to the legal profession that historical conviction rates are not admissable as evidence in a particular case. Even if 99% of all murder trials had resulted in conviction in a jurisdiction, this would not lead to the decision to declare all future trials irrelevant and proceed immediately to the highly probable guilty verdict. Whether the asserted 75% identification rate of true fathers in paternity cases should be allowed to influence the allocation of prior probabilities is a question that should be decided by jurists, not geneticists.

Conclusion

There is no question that genetic tests are immediately relevant in paternity cases, nor is there any serious dispute that the laboratory tests are scientific in character. There is, however, some controversy over how the laboratory results should be presented.

Since the science of genetic testing has progressed to the point that the information it can bring to bear on paternity cases is strong and convincing, it seems unnecessary to risk calling that information into question by reporting it in a manner that is subject to challenge. There does not seem to be any compelling reason to depart from the model that is usual in reporting the results of a medical test. One need only quote the true positive and true negative rates of the test and the result in the particular instance. If this presentation of evidence is not persuasive, then no useful purpose would be served by carrying out dubious comparisons of proximal and distal probabilities.

Consumers of the products of serological testing should be less concerned that the laboratory can calculate an impressive paternity probability and more concerned that it can provide convincing, accurate estimates of the true positive and true negative rates of the tests it actually performs, including an assessment of its unreliability or error rates.

GUIDELINES FOR REPORTING ESTIMATES OF PROBABILITY OF PATERNITY*

Richard H. Walker

"Some Fallacies in the Computation of Paternity Probabilities" by Mikel Aickin [1] purports to discredit the Guidelines for Reporting Estimates of Probability of Paternity established by the American Association of Blood Banks [2]. Dr. Aickin's assumptions, reasoning, and statements require a response since they challenge the fundamental logic employed in the laboratories of the United States, Europe, and Scandinavia in calculations and the reporting of results in nonexclusion cases.

The recent alarming increase in illegitimate births in the United States has intensified interest in establishing paternity of these infants. Blood tests offer the best means of providing valuable objective evidence for or against paternity of men alleged to be fathers.

An international conference was convened by the American Association of Blood Banks (AABB) at Airlie, Virginia, in May 1982 under a grant from the Office of Child Support Enforcement of the U.S. Department of Health and Human Services in order to develop consensus in the method of calculating and reporting the probability of paternity when there is a failure to exclude the alleged father in paternity disputes. The AABB perceived a need for a uniform method to enhance credibility and communication to the courts. The Guidelines were developed after hearing various proposals and arguments from experts in the field. Eight experts in paternity testing from Europe, Scandinavia, and England were invited to participate together with several workers from the United States in this conference. In addition, two consultants in population genetics and biostatistics were invited to critique the presentations. These four consultants were selected because they were not involved in parentage testing and therefore could take an impartial look at what was presented and the logic of the calculations. A number of other diverse, invited experts in mathematics, jurisprudence, and genetics participated. Dr. Aickin was one of the contributors to this conference.

The invited experts were given one test case to evaluate in which there was no exclusion of the alleged father. Gene/haplotype frequency tables were supplied for the calculations. The test case involved a total of six genetic systems and included systems in which the maternal and paternal gene contributions to the child were obvious as well as systems where alternative possibilities existed. The HLA system analysis was complex since blanks existed at both the A and B loci in the child.

All 14 participants who responded to the test case obtained the same result although different styles and logic were employed. This achievement is of great significance since it reflects international unanimity in terms of the mathematical result.

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*The rebuttal to Dr. Mikel Aickin's article, "Some Fallacies in the Computation of Paternity Probabilities," was submitted in the form of a letter to the editor of the American Journal of Human Genetics in October 1984 and subsequently appeared in the Journal in August 1985. Written permission has been received by the author, Dr. Richard H. Walker, William Beaumont Hospital, Royal Oak, Michigan.

Various proposals and methods were discussed and debated during the conference. A strong case for reporting the probability of paternity based upon the failure to exclude after using multiple systems was proposed by Dr. C. C. Li; [3]. This suggestion was given very deliberate consideration by the Committee and was recognized as having great merit. After a review of this and other proposals and suggestions, the Committee on Parentage Testing of the AABB developed the Guidelines for use by laboratories in the United States.

The Guidelines have been subsequently approved by the Board of Directors, American Association of Blood Banks; Section of Family Law, American Bar Association; and Council on Scientific Affairs, American Medical Association.

These Guidelines do not require the reporting of any specific numerical expression but they do indicate that some mathematical estimate of the probability of paternity should be calculated from the observed phenotypes of the mother, child, and alleged father when there is a failure to exclude.

The Paternity Index (PI), referred to by Aickin as the likelihood ratio (LR), has become established as the basic mathematical expression employed by most laboratories in the United States and Europe. This value can also be transformed into a percentage expression using .5 as a prior probability value. This percentage expression, the probability of paternity, is the estimate most familiar to the legal community and the courts. The calculation is based entirely upon the genetic markers identified in the trio and does not consider any nongenetic evidence in the case such as access, impotency, sterility, and other men who could be the biological father.

Aickin's paper considered "three basic fallacies" in the probability of paternity statement used by laboratories engaged in paternity testing. Dr. Aickin's first argument is that the statement of probability of paternity is a fallacy since the "figure is not, in fact, the probability that the alleged father is the true father." The PI is a statement of probabilities in the form of a ratio that expresses the probability that a man with the same phenotype as the alleged father is the biological father of a child with the phenotypes observed when he is compared to an untested man from the same population. The assumption is made in one-man cases that the biological father was either the alleged father or an untested man often referred to as a random man. As Dr. Aickin points out, the PI is not exclusive for the alleged father but applies equally to all men of the same phenotype as the alleged father. Such a consideration is implicit in the definition of the PI ([2], pp. 475 and 656). However, Dr. Aickin avoids pursuing this matter to its logical conclusion. The relevant sequel to this statement is the question: How many men are there who have the same phenotype as the alleged father? The answer depends upon the extent of genetic testing performed in each case under consideration, but the value is frequently less than 1 in 100,000 ([2], p. 31).

The second criticism of Dr. Aickin involves factors that are unknown to the testing laboratory and therefore cannot be used in the calculation. Dr. Aickin has indicated that even in one-man cases there may be other "plausible fathers" beyond the man named by the mother, that is, the alleged father being tested. This may certainly be true, but such information is unknown to the laboratory and therefore cannot be used in a calculation. Thus, a neutral prior probability is used in the calculation. The reported probability of paternity can be adjusted up or down based upon the weight of other evidence in the case. However, such an adjustment is not in the province of the laboratory scientist. This is the responsibility of the judge or jury charged with evaluating all of the evidence in the case. The calculation does, however, consider all possible (compatible) fathers in the denominator of the PI by selecting the untested man using gene frequencies established from a large population. The gene frequencies utilized are based on the racial origin rather than geography and are used in both the numerator and denominator of the PI.

In those rare cases where more than one man is tested, experience has demonstrated that it is usual for all but one man to be excluded. When more than one man is not excluded in a single case, a calculation of the relative probability of paternity can be given for each nonexcluded man. Formulas for such calculations have been published by Prof. K. Hummel [4]. However, the question of access to the mother, frequency of intercourse, and potency and fertility of each plausible father consitute additional variables that would also be unknown and therefore could not be accurately quantitated.

Although the race of the biological father is unknown, it is important for the laboratory to use gene frequencies in the calculation from a carefully selected and large sample of the population of the same race claimed by the mother and alleged father. Gene frequency tables have been published by the AABB ([5], p. 29 ff.) for use by parentage testing laboratories in making these calculations.

Dr. Aickin's third challenge involves the estimation of genotype frequencies within a given phenotype when silent alleles may be present. He asserts that genotype frequency assignments within such phenotypes represent "speculation about random draw." In practice, such assignments are based upon published tables of gene frequencies that are then utilized in the Hardy-Weinberg formula to estimate genotype frequencies within phenotypes. Fundamental genetic principles are applied to the calculations of both genotype frequencies and gamete frequencies.

Dr. Aickin cites the example of a group B mother with an O child and points out that the biologic father must contribute an O gene. He then states that "whether a man additionally carries A or B or another O gene is irrelevant to paternity." While it is true that the only requirement for a man to be the biologic father is to carry an O gene, it is not true that the chances of men whose phenotypes are A, B, and O all have equal chances of transmitting an O gene. The PI values for these phenotypes are as Dr. Aickin indicates: 0.63 for A, 0.72 for B, and 1.51 for O. This observation clearly demonstrates that the group O alleged father is over two times more likely to contribute an O gene than is a group A alleged father. In fact, the O alleged father cannot contribute a wrong gene while the group A alleged father has a 58% chance of transmitting an A gene that is incompatible with paternity. An obvious implication by Dr. Aickin would be that genetic counseling is of no value in instances where the phenotype does not reflect the genotype. A random woman is not equally likely to produce a hemophiliac son as is a woman known to be the sister of a hemophiliac. However, both carry normal genes. Neither are A, B, and O fathers equally likely to produce O children. Their relative chances of producing an O child can be calculated using the basic principles of population genetics. Of course, any of them could produce such a child but the probabilities are not the same. The fact that the "LR may be enormous" does not necessarily mean that it is incorrect but rather may indicate a true statement of the probabilities.

We agree that family studies would be of value in yielding an improved estimte of the probability of paternity. Such studies should not be limited to the alleged father or plausible fathers, but may also be informative and helpful when the mother's family is studied. Major problems, however, are state statutory laws, cooperation, and illegitimacy.

The principles used in the calculations for the probability of paternity require not only a knowledge of basic algebra and probability, but also the fundamentals of blood group genetics including the Hardy-Weinberg principle. Any expression from the laboratory relating to the probability of paternity should only be used with other evidence in the case in the resolution of the paternity dispute. The blood test results, however, do provide valuable objective evidence in these matters. Such objective evidence should not be ignored.

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